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In the Supreme Court of the United States

OCTOBER TERM, 1975

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SUPREME COURT, U.S.

No. 75-978

E. I. DU PONT DE NEMOURS AND COMPANY, OLIN CORPORATION, FMC CORPORATION, AMERICAN CYANAMID COMPANY, MONSANTO COMPANY, THE DOW CHEMICAL COMPANY, ALLIED CHEMICAL CORPORATION, AND HERCULES INCORPORATED,

Petitioners,

v.

RUSSELL E. TRAIN, as Administrator, Environmental Protection Agency, and JOHN R. QUARLES, as Deputy Administrator, Environmental Protection Agency,

Respondents.

**Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

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**Petition For A Writ Of Certiorari To The
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For The Fourth Circuit**

Petitioners E. I. du Pont de Nemours & Co., *et al.*,¹ ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on December 30, 1975.

Opinions Below

The opinion of the court of appeals is not yet officially reported. The opinion and the judgment of the court of appeals are annexed hereto as Appendix A. The opinion of the United States District Court for the Western District of Virginia is reported at 383 F. Supp. 1244. The opinion

¹ Petitioners are E. I. du Pont de Nemours and Company, Olin Corporation, FMC Corporation, American Cyanamid Company, Monsanto Company, The Dow Chemical Company, Allied Chemical Corporation, and Hercules Incorporated.

and order of the district court are annexed hereto as Appendix B.

Jurisdiction

The judgment of the court of appeals here sought to be reviewed was entered on December 30, 1975. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether district courts or courts of appeals have initial jurisdiction to review regulations issued by the Administrator of the Environmental Protection Agency under the Federal Water Pollution Control Act, as amended, governing wastewater effluent discharges from existing plants.

2. Whether the Federal Water Pollution Control Act, as amended, provides that regulations governing wastewater effluent discharges from existing plants be issued in the form of

(a) "effluent limitations" based upon an authorization said to be implied from Section 301(b) of the Act, or

(b) "guidelines for effluent limitations" in compliance with the express command of Section 304(b) of the Act.

3. Whether when "the Act is not clear" in conferring initial jurisdiction to review regulations for existing plants upon the courts of appeals rather than in providing the normal review in the district courts, the statute should be construed on grounds of practicality to confer such initial jurisdiction on the courts of appeals.

Statutes And Regulations Involved

1. *The Federal Water Pollution Control Act, as amended.* Sections 101, 301, 302, 304, 306, 307, 309, 401, 402, 502, 505 and 509 of the Act (33 U.S.C. §§ 1251, 1311, 1312, 1314, 1316, 1317, 1319, 1341, 1342, 1362, 1365 and 1369) are set forth in Appendix C, *infra*.

2. "Effluent Limitations Guidelines" for the Inorganic Chemicals Manufacturing Point Source Category. The regulations issued by the Administrator which govern the wastewater effluent discharges from existing plants in the Inorganic Chemicals Manufacturing Point Source Category are found at 39 *Fed. Reg.* 9611-9639 (March 12, 1974). They are set forth in Appendix D, *infra*.

STATEMENT OF THE CASE

This case presents the question of whether jurisdiction to review certain regulations issued by the Administrator of the Environmental Protection Agency lies as an initial matter in the district courts or in the courts of appeals. This jurisdictional issue is intertwined with substantive issues of the proper construction to be accorded key sections of the statute authorizing the regulations. The Court must necessarily consider the statutory issues in resolving the jurisdictional question. See *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951); *Bell v. Hood*, 327 U.S. 678 (1946).

The regulations govern wastewater effluent discharges for existing plants as contrasted to new plants,² and are issued pursuant to the Federal Water Pollution Control Act, as amended ("the Act"), 33 U.S.C. §§ 1251 *et seq.* The nature of the statutory authority for such regulations is in dispute.

A. The Statutory Framework

In 1972 the Congress enacted the Federal Water Pollution Control Act Amendments of 1972. Pub. L. 92-500, 86 Stat. 816. The Federal Water Pollution Control Act, as basically and extensively revised by the 1972 Amendments,

² This proceeding relates only to effluent guidelines applicable to existing plants. Other sections of the statute and of the regulations deal with standards applicable to new sources (new plants) (§ 306, 33 U.S.C. § 1316), or pretreatment of wastes before they may be discharged into a public treatment system (*e.g.*, for a municipality) (§ 307, 33 U.S.C. § 1317).

33 U.S.C. §§ 1251, *et seq.*, constitutes the organic statute under which all effluent discharges from industrial plants and municipalities are regulated.

The structure of the Act is based on a general prohibition of discharges except as they are permitted under the law. (§ 301, 33 U.S.C. § 1311.) Permits for effluent discharges are issued under Section 402 of the Act, 33 U.S.C. § 1342, and the limits and conditions which restrict the discharge of an individual industrial plant are fixed in the permit after proceedings conducted under Section 402.³ Unless a plant has a permit, no effluent discharges are lawful.⁴

The permit procedure is based on the Congressional policy that the primary responsibility for water quality protection shall rest with the States. (§ 101(b), 33 U.S.C. § 1251(b).) When a State's permit program meets the requirements of the Act, as determined by the Administrator, the statute provides that the permit granting authority shall be transferred to the State from EPA. (See § 402(b)-(f), 33 U.S.C. § 1342(b)-(f).) As of January 1, 1976, twenty-seven (27) States had qualified and now administer the permit program within their respective jurisdictions.⁵

³ These are the effluent limitations defined by Section 502(11), 33 U.S.C. § 1362(11):

"(11) The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."

⁴ The statute provided, however, that prior to December 31, 1974, if a permit application was pending without dispositive action, effluent discharges from existing plants did not violate the Act. (§ 402(k), 33 U.S.C. § 1342(k).)

⁵ These states are:

STATE	DATE OF APPROVAL	FEDERAL REGISTER NOTICE OF APPROVAL
California	May 14, 1973	39 Fed. Reg. 26061
Oregon	September 26, 1973	39 Fed. Reg. 26061
Connecticut	September 26, 1973	39 Fed. Reg. 26061
Michigan	October 17, 1973	39 Fed. Reg. 26061
Washington	November 14, 1973	39 Fed. Reg. 26061
Wisconsin	February 4, 1974	39 Fed. Reg. 26061

For existing plants, the fulcrum for the regulatory framework in which the permit system operates is provided by the regulations setting out the technology based guidelines for effluent limitations under Section 304(b) of the Act, 33 U.S.C. § 1314(b).

The purpose of these guideline regulations is provided by Section 301, 33 U.S.C. § 1311. Subsection (b) of Section 301 has two important attributes. It sets out in technological terms the objective to be "achieved" by existing plants on a stringent time schedule:

(1) By July 1, 1977, effluent limitations shall be achieved which require application of the "best practicable control technology currently available".

(2) By July 1, 1983, and thereafter, the level to be attained is "best available technology economically achievable" (including elimination of discharges when it becomes "technologically and economically achievable").

STATE	DATE OF APPROVAL	FEDERAL REGISTER NOTICE OF APPROVAL
Ohio	March 11, 1974	39 Fed. Reg. 26061
Vermont	March 11, 1974	39 Fed. Reg. 26061
Delaware	April 1, 1974	39 Fed. Reg. 26061
Mississippi	May 1, 1974	39 Fed. Reg. 26061
Montana	June 10, 1974	39 Fed. Reg. 26061
Nebraska	June 12, 1974	39 Fed. Reg. 26061
Georgia	June 28, 1974	39 Fed. Reg. 26061
Kansas	June 28, 1974	39 Fed. Reg. 26061
Minnesota	June 30, 1974	39 Fed. Reg. 26061
Maryland	September 5, 1974	39 Fed. Reg. 34601
Missouri	October 31, 1974	39 Fed. Reg. 40067
Hawaii	November 29, 1974	39 Fed. Reg. 43759
Indiana	January 2, 1975	40 Fed. Reg. 4033
Wyoming	January 31, 1975	40 Fed. Reg. 13026
Colorado	March 28, 1975	40 Fed. Reg. 16713
Virginia	April 1, 1975	40 Fed. Reg. 20129
South Carolina	June 11, 1975	40 Fed. Reg. 28130
North Dakota	June 14, 1975	40 Fed. Reg. 28663
Nevada	September 20, 1975	40 Fed. Reg. 48389
North Carolina	October 20, 1975	40 Fed. Reg. 51493
New York	October 29, 1975	40 Fed. Reg. 54462

In addition, Section 301 provides that these technological objectives shall be defined and determined⁶ in accordance with regulations under Section 304(b). The regulations under Section 304(b), therefore, become the key to the achievement of both the 1977 and the 1983 objectives.⁷

Congress accorded this crucial role to guidelines issued under Section 304(b) to create a regulatory mechanism to cope with the existing plants already in place and operating. Congress recognized the large number of existing industrial plants which are sources of water pollution and the enormous diversity of these plants and their products and processes which would have to be taken into account in the permit program.⁸ EPA's statement in the introduction to the regulations speaking of the 1977 guidelines describes the interrelationship between the uniform technological objectives set out in Section 301 and the guideline regulations under Section 304(b) as follows:

⁶ The statute uses the term "defined" in Section 301(b)(1)(A) in providing for achievement of the 1977 objectives, and the term "determined" in Section 301(b)(2)(A) in providing for achievement of the 1983 objectives.

⁷ This regulatory pattern in the statute is confirmed by the legislative history of the Act. Thus, the Senate Report stated:

"The program proposed by this Section [§ 301] will be implemented through permits issued in Section 402." (S. Rep. 92-414, 92d Cong., 1st Sess., at 42 (1971), reproduced in Congressional Research Service of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 1460 (1973) (hereafter "Leg. Hist.")).

It then went on to describe the Section 402 permit program as follows:

"A permit or equivalent program, properly implemented and fully utilizing the resources of the State and Federal Government should provide for the most expeditious water pollution elimination program.

"The information on the technology of control developed under section 304 should facilitate the administration of this system." (*Id.* at 72; Leg. Hist. at 1490.)

⁸ In contrast, for new plants Congress directed the Administrator to issue "Federal standards of performance for new sources" within the industry categories, and not guidelines. (§ 306(b)(1)(B), 33 U.S.C. § 1316(b)(1)(B) (emphasis added).)

"Section 304(b)(1)(B) of the Act provides for guidelines to implement the uniform national standards of section 301(b)(1)(A). Thus Congress recognized that some flexibility was necessary in order to take into account the complexity of the industrial world with respect to the practicability of pollution control technology." Appendix D, at 17-d.)

In light of the statutory role assigned to guideline regulations under Section 304(b), Congress prescribed that they have two essential elements. *First*, the regulations "shall" identify the degree of effluent reduction attainable by 1977 through the application of "best practicable control technology currently available" for classes and categories of point sources. (§ 304(b)(1)(A).) *Second*, the statute directs that the regulations "shall . . . specify factors to be taken into account in determining control measures and practices to be applicable to point sources . . . within such categories or classes". (§ 304(b)(1)(B).)⁹

Congress explicitly set out in Section 304(b) the factors which EPA was to specify and elaborate with further precision in the regulations.¹⁰ Thus, the statutory provisions mandating the content of the Section 304(b) regulations make it plain that the guidelines are not merely to identify the pollution reduction attainable with the "best prac-

⁹ The comparable provisions pertaining to the 1983 guideline regulations are contained in Section 304(b)(2)(A) and (B).

¹⁰ For example, for the 1977 guideline regulations, Congress mandated that the Administrator's regulations "shall" specify and elaborate the following factors:

"Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate. . . ." (§ 304(b)(1)(B) (emphasis added).)

The comparable identification of factors to be specified for the 1983 guideline regulations is in Section 304(b)(2)(B).

licable" (1977) and "best available" (1983) technology. The guidelines are also to provide the permit issuing authorities with EPA's elucidation, and elaboration in the context of the industry-category involved, of the factors to be taken into account in actually determining the application of the guidelines to a particular plant. Thus formulated, the guidelines will perform their intended function in a permit proceeding.

The guideline regulations have a role beyond the initial permit proceedings for a particular plant. Where States and not EPA have the permit-issuing authority, the Act provides that the State shall transmit to the Administrator for his review any permit which it proposes to issue. (§ 402(d)(1), 33 U.S.C. § 1342(d)(1).) The Administrator can block issuance of the permit by the State if within 90 days he "objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act". (§ 402(d)(2), 33 U.S.C. § 1342(d)(2).)

Section 509 of the Act (33 U.S.C. § 1369) provides for a method of judicial review of certain specific actions of EPA which is different from the normal review procedure in district courts under the Administrative Procedure Act. Section 509 provides that a special review by petition in the courts of appeals shall apply to an expressly specified group of actions by the Administrator, *i.e.*, certain actions under Sections 301, 302, 306 and 307, as well as certain actions taken respecting permits under Section 402. Regulations under Section 304(b) are not mentioned in Section 509.

B. Administrative Proceedings

The 1972 Amendments became law on October 18, 1972. Approximately ten months thereafter, on August 6, 1973, EPA published in the *Federal Register* a notice setting out, among other things, its procedures for adopting guideline regulations under Section 304(b):

"Advance notice is hereby given concerning notices of proposed rule making to be published by the Environ-

mental Protection Agency ("EPA") with respect to effluent limitations guidelines, standards of performance, and pretreatment standards for new sources pursuant to sections 304(b), 306 and 307(c) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251, 1314, 1316 and 1317(c); 86 Stat. 816 et seq.; Pub. L. 92-500) ("the Act"). *The purpose of this notice is to facilitate public comment upon the regulations to be promulgated under sections 304(b), 306 and 307(c), both before and after the publication of the notices of proposed rule making.* In addition, this notice will explain EPA's overall plans for development of effluent limitations guidelines and standards of performance for new sources and the approach which is being taken by the Agency in discharging the duties placed upon the Administrator under sections 304(b), 306 and 307(c) of the Act. EPA believes that the exposure of the technical basis and reasoning underlying regulations to be established pursuant to sections 304(b), 306 and 307(c) is essential to the promulgation of sound effluent limitations guidelines and standards of performance for new sources." (38 *Fed. Reg.* 21202 (August 6, 1973) (emphasis added).)¹¹

Also in the August 1973 notice, EPA announced that it had initiated technical studies by independent contractors "of some thirty [separate] point source [industrial] categories for which regulations will initially be promulgated. . . ." (38 *Fed. Reg.* at 21203.) Among the industrial categories was "[No.] 15. Inorganic Chemicals Manufacturing". (*Id.*) EPA said it would make the contractor's technical reports available for review by interested persons, prior to the time it actually proposed any regulations for an industry. (*Id.* at 21205-21206.)

EPA's contractor for the inorganic chemicals industry regulations was General Technologies Corp. ("General Technologies"). In June 1973, EPA made available General Technologies' "Draft Contractor's Report". That report

¹¹ As noted *supra*, at 3 n.2, Section 306 provides for standards of performance for new sources. Section 307 provides for pretreatment standards for existing sources (subsection 307(b)), and for new sources (subsection 307(c)).

set out technical wastewater and treatment information for 22 separate products in the industry. In a preambular statement to the report, the Agency stated—"The regulations to be published by EPA under Sections 304(b) and 306 of the Federal Water Pollution Control Act, as amended, will be based to a large extent on the report and the comments received on it."

Next, in August 1973, EPA made available an "Economic Analysis Of Proposed Effluent Guidelines—Inorganic Chemicals, Alkali And Chlorine Industries (Major Products)". This report also was prepared for EPA by an independent contractor, under the Agency's supervision. EPA's preface to the report said that the purpose of the economic study was

"to analyze the economic impact which could result from the application of alternative effluent limitation guidelines and standards of performance to be established under sections 304(b) and 306 of the Federal Water Pollution Control Act, as amended."

The Agency received comments from interested parties, including the petitioning companies. And by August 1973, EPA had reviewed and revised the General Technologies technical report and issued its "Development Document for *Proposed Effluent Limitations Guidelines and New Source Performance Standards for the Major Inorganic Products Segment of the Inorganic Chemicals Manufacturing Point Source Category*". (Emphasis added.) Then, on October 11, 1973, EPA published a notice of proposed rulemaking for "effluent limitations guidelines and standards of performance" applicable to the previously-studied 22 separate product subcategories in the inorganic chemicals industry. (38 *Fed. Reg.* 28173-28194.) The Agency relied upon the reports of General Technologies and of its economic contractor, the comments made on those reports by interested parties, and its own assessment of technical treatment information. (38 *Fed. Reg.* at 28175.) For existing plants EPA said that "[t]he regulations proposed herein set forth effluent limitations guidelines, pursuant to

section 304(b) of the Act, for . . . [the 22 individual product subcategories], of the inorganic chemicals manufacturing category". (38 *Fed. Reg.* at 28174.)

Comments were submitted on the Agency's proposed guideline regulations for existing plants and new source standards of performance for new plants. During the time the Agency was evaluating comments on the proposed guidelines for the inorganic chemicals industry, EPA issued general definitional regulations applicable to all the industry-category regulations. (40 C.F.R. Part 401, *added by* 39 *Fed. Reg.* 4531-4533 (February 4, 1974).) Those general regulations contained a definition of "effluent limitations guidelines":

"(j) The term 'effluent limitations guidelines' means any effluent limitations guidelines issued by the Administrator pursuant to section 304(b) of the Act." (40 C.F.R. § 401.11(j).)

But before the Agency had finished its evaluation of the comments and issued its final regulations, an Agency document was written and publicized which gave notice that EPA was changing the asserted legal basis of the regulations for existing plants. On February 25, 1974, Alan G. Kirk II, the Assistant Administrator for Enforcement and General Counsel, wrote in a widely-publicized memorandum that "the effluent limitations guidelines which the Agency is presently issuing under Section 304(b) are also being issued [under] Section 301 and establish effluent limitations under Section 301". (Memorandum from Alan G. Kirk II to Acting Assistant Administrator for Air and Water Programs, at 2, February 25, 1974.) Assistant Administrator Kirk's Memorandum also contained a warning, *i.e.*, the Agency's new reliance on Section 301 as an authority for its regulations applicable to existing plants had consequences for the jurisdiction and timing of any judicial action brought to obtain review:

"these guidelines fall within the provision in Section 509(b) for judicial review within 90 days of 'any effluent or other limitation under Section 301.' The

effluent limitations guidelines promulgated by the Agency will implement both Section 301 and Section 304. Since it would be impossible to challenge the Section 301 limitations without challenging the Section 304(b) guidelines, the requirements in Section 509(b) that limitations promulgated pursuant to Section 301 be challenged in the United States Court of Appeals and within 90 days almost must be considered to include challenges to Section 304 guidelines." (*Id.* at 2.)

Very shortly thereafter, on March 12, 1974, the Agency issued its final regulations for the 22 product subcategories of the inorganic chemicals industry. (39 *Fed. Reg.* 9611-9635; Appendix D.) Notably, EPA still called its regulations for existing plants "[e]ffluent limitations guidelines". (See, e.g., 40 C.F.R. § 415.192, *added by* 40 *Fed. Reg.* 9632 (March 12, 1975); *infra*, at 31-d.) And although EPA mentioned Section 301 along with Section 304 in the preamble of the rulemaking order,¹² concurrently it asserted that "[t]he legal basis" for the regulations was that set forth in the August 1973 general notice of procedures (see *supra*, at 8-9), which of course referred only to guideline regulations under Section 304. (39 *Fed. Reg.* at 9612; *infra*, at 2-d.)

C. Judicial Proceedings And Decisions Below

On April 1, 1973, the petitioning companies filed a complaint in the U.S. District Court for the Western District of Virginia seeking review of EPA's guideline regulations applicable to existing plants in the sulfuric acid production subcategory of the inorganic chemicals industry. (40 C.F.R. §§ 415.210-213, *infra*, at 35-d to 36-d.) The companies asserted that the district court had jurisdiction of the review action based upon the provisions of 28 U.S.C. §§ 1331, 1332, 1337, 1361 and 1651, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and Section 10 of the

¹² The Agency said: "This final rulemaking is promulgated pursuant to sections 301, 304(b) and (c), 306(b) and (c) and 307(c) of the Federal Water Pollution Control Act, as amended. . . ." (39 *Fed. Reg.* at 9612; *infra*, at 2-d.)

§§ 701-706. Contemporaneously fifteen companies including the eight petitioning companies filed "protective" petitions for review of the EPA inorganic-chemical guideline regulations in the U.S. Court of Appeals for the Fourth Circuit. E.g., *E. I. du Pont de Nemours & Co. v. Train*, No. 74-1261 (4th Cir.). The actions in the district court and in the courts of appeals proceeded independently for a time.

In the district court the companies promptly filed a motion seeking partial summary judgment on the issues of that court's jurisdiction and of EPA's power and obligations under the Act to issue regulations for existing plants. EPA filed a motion to dismiss the district court action based upon an asserted lack of subject matter jurisdiction. The companies argued that EPA was mandated by the Act to issue guideline regulations for existing plants under Section 304(b), that the Agency had not been granted power to issue effluent limitations by regulations under Section 301, that a contrary construction would emasculate the Congressionally-structured power of State permit-issuing authorities, and that jurisdiction to review guideline regulations properly lay with the district court. EPA contended that it had an implied power under Section 301 to issue effluent limitations by regulations, that Section 304(b) merely provided a "definitional" basis for establishing the effluent limitations, that the limitations were to be "mechanically cranked" into permits for particular plants, and that Section 509(b) of the Act provided for exclusive jurisdiction of any review action in the courts of appeals.

After a hearing on the cross-motions, the district court on September 27, 1974, issued an opinion and order adopting EPA's contentions and dismissing the complaint. See *infra*, Appendix B. An expedited appeal was taken.

In the court of appeals during this same period, the Fourth Circuit had consolidated the protective review actions, and the Agency had filed the administrative record

of the rulemaking proceedings with the court.¹³ A brief was filed by the companies on legal issues, i.e., contesting EPA's statutory construction and the jurisdiction over the protective petitions by the court of appeals. In addition, the companies also filed briefs challenging eleven of the 22 product subcategory guidelines, on the ground that the regulations were not supported by the administrative record. Similarly, EPA's brief covered both the legal and the technical issues. Six *amici curiae* were given leave to file briefs on various legal and technical issues.

After briefing but before the guideline cases were argued, the appeal from the district court's decision was perfected. On motion of the parties, the appeal was consolidated by the court of appeals with the guideline review actions. The court of appeals ordered a truncated and accelerated supplemental briefing schedule for the appeal.

Argument to the court of appeals of the consolidated petitions and appeal was had on April 22, 1975. Thereafter, on December 30, 1975, the court of appeals issued a decision in the appeal only. It affirmed the district court's judgment and upheld its own jurisdiction over the protective review petitions, but its reasoning for doing so was quite different from that of the district court. The court of appeals opined that it had jurisdiction under the Act to review action by the Administrator in promulgating guidelines under Section 304, even if the Administrator had no power to issue limitations by regulations under Section 301:

"Even if § 301 merely sets out the technological objectives to be attained under the Act, courts of appeals may properly assume jurisdiction to review actions of the Administrator in issuing regulations to achieve these objectives. If § 301 is to be viewed in the man-

¹³ Separate petitions for review were also filed respecting EPA's new source standards for the industry, issued under Section 306(b) of the Act. These actions were consolidated by the court of appeals into a separate group, and the briefing on this separate group proceeded independently of the consolidated guideline actions.

ner advocated by the appellants, then § 304(b) must necessarily be deemed the key to the attainment of the objectives set forth in § 301. Thus, to obey the mandate of § 301, 'guidelines for effluent limitations' must be promulgated under § 304(b). Construed in this light, *any action taken by the Administrator under § 304(b) should properly be considered to be pursuant to the provisions of § 301 and, therefore, reviewable by this court under § 509.*" (Appendix A, at 11-a (emphasis added).)

The court of appeals to date has not issued its decision in the protective review actions.

REASONS FOR GRANTING THE WRIT

I. There Is A Four-Way Conflict Among The Courts Of Appeals On The Statutory Authority Of The Administrator To Issue The Central Regulations Under The Act And On The Jurisdiction Of Federal Courts To Review Those Regulations.

This is a case of first impression raising substantial issues of nationwide importance regarding the construction of the Federal Water Pollution Control Act. The questions in this case are crucial to implementation of that Act because they relate to the nature of, and the statutory authority of the Administrator to issue, the central regulations under the Act applicable to all industrial discharges by existing plants into navigable waters in the United States. To date, five courts of appeals have considered and decided the questions here presented. In deciding the five cases, the courts of appeals have adopted four separate and conflicting positions respecting the intertwined questions of jurisdiction and statutory construction. This four-way conflict involves important issues which have not been and which should be decided by this Court.

The Federal Water Pollution Control Act mandates that the Administrator publish on a specified, prompt time schedule regulations governing effluent discharges from existing plants. It holds out a promise to those affected by

the regulations that judicial review may be had of the Administrator's action in establishing the regulations. And, it requires achievement on a stringent time schedule of the technological objectives implemented by the regulations. The Act's timetable for actions has been short-circuited by the unresolved conflict of views over questions of basic statutory construction and over the courts' jurisdiction to review disputed actions by the Administrator.

To a considerable extent, the positions of the various courts of appeals reflect the manner in which the questions of basic statutory construction and jurisdiction were presented.

The first decision by a court of appeals on these questions was by the Eighth Circuit in *CPC International Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975). The Eighth Circuit had before it protective petitions filed by corn wet milling companies seeking review of EPA's guideline regulations and new source standards for the "Corn Wet Milling Subcategory" of the "Grain Mills Point Source Category". (515 F.2d at 1034.) The petitioners in the *CPC* case had raised and briefed to the Eighth Circuit the issues of jurisdiction and basic statutory construction. The Eighth Circuit's decision held that the statute did not empower the Administrator to promulgate by regulations effluent limitations for existing plants.¹⁴ Rather, under the mandatory language of Section 304(b), the Administrator was required to issue guideline regulations for existing plants. (515 F.2d at 1037.) The Eighth Circuit also concluded that the guideline regulations were to be reviewed initially in the district courts, observing that Section 509(b) of the Act did not specify promulgation of the Section 304(b) guideline regulations as being among the expressly listed group of actions which were to be reviewed in the courts of

¹⁴ The Administrator had argued that he had implied authority to issue limitation regulations, and that such regulations were "to be mechanically cranked into individual permits issued by the states or the EPA". (515 F.2d at 1037.)

appeals. (*Id.*)¹⁵ The Eighth Circuit reached its conclusions only after an exhaustive survey of ancillary statutory provisions and of the legislative history of the Act.¹⁶

Then, in *American Iron and Steel Institute v. Environmental Protection Agency*, —F.2d—, No. 74-1640 (3d Cir., decided November 7, 1975), the Third Circuit considered the issue of statutory construction. Like the corn wet milling companies in the *CPC* case, the petitioning steel companies had contended that the Administrator had no power to issue limitations by regulations, but rather, a Section 301 limitation was to be established through a permit proceeding using the Section 304(b) guideline regulations. (Slip opinion, at 13.) The petitioning companies, however, did not raise the jurisdictional issue. After discussing the Eighth Circuit's *CPC* decision and the positions of the parties, the Third Circuit concluded that the Administrator could issue limitation regulations under Section 301 which would provide a treatment "base level", and concomitant pollutant ceiling". (Slip opinion, at 33.) However, the Third Circuit at the same time sought to give effect to Section 304's mandate that guideline regulations be issued. The court held that for the use of permit-issuing authorities the Administrator had to issue guideline regulations providing a range of more stringent controls underneath the Section 301 ceiling:

"Having determined the 'base level', and the 'ceiling', he [the Administrator] must then promulgate guide-

¹⁵ The court took especial "note that counsel for the government stated at oral argument that, if it were held that the existing source regulations had been promulgated pursuant to § 304(b), they would be reviewable in District Court". (515 F.2d at 1038 n.12.)

¹⁶ The Eighth Circuit took jurisdiction to review the new source standards for the corn wet milling industry; the parties had agreed that jurisdiction to review those standards was in the courts of appeals under Section 509(b)(1)(A) ("standards of performance for new sources") and (C) ("pretreatment standard for new sources"). On the merits, the Eighth Circuit determined that both the standards of performance for new sources and the pretreatment standards for new sources were not supported by the administrative record, and the court remanded the standards to the Agency. (515 F.2d at 1043-1052.)

lines which are to guide the permit-issuing authorities in deciding whether, and by how much, the limitation to be applied to any individual point source is *more* stringent than the base level (in terms of requiring more effective technology), and more stringent than the ceiling (in requiring a lower amount of effluent discharge). *Thus, we reconcile sections 301 and 304 in the following manner: the section 301 limitations represent both the base level or minimum degree of effluent control permissible and the ceiling (or maximum amount of effluent discharge) permissible nationwide within a given category, and the section 304 guidelines are intended to provide precise guidance to the permit-issuing authorities in establishing a permissible level of discharge that is more stringent than the ceiling.*" (Slip opinion, at 33-34 (emphasis by the court and emphasis added).)

The Third Circuit remanded the regulations for the iron and steel industry to EPA in accordance with its opinion. Judge Adams, in a concurring opinion, expressed distress and dismay at "[t]he failure [of Congress] to provide a clear procedural structure on so basic a matter in the administration of the Act. . . ." (Concurring slip opinion, at 4.)

Yet a third position on these issues of statutory construction and jurisdiction was adopted by the Seventh Circuit in *American Meat Institute v. Environmental Protection Agency*, —F.2d—, No. 74-1394 (7th Cir., decided November 24, 1975). The petitioner sought review of EPA's regulations for existing slaughterhouses and meat-packing plants. Petitioner raised only technical issues dependent upon the administrative record. Petitioner did not contend that EPA had failed to comply with Section 304(b). (Slip opinion, at 9 n.13.) The court allowed *amici curiae* to raise the jurisdictional issue but no other questions. (Slip opinion, at 8-9 & n.12.) The Seventh Circuit held that the Administrator had authority to issue limitations by regulation under Section 301, and that as a consequence, it had jurisdiction to review EPA's regula-

tions for the meat industry.¹⁷ The Seventh Circuit's decision is thus in accord with the district court's decision in the *du Pont* case.

The Tenth Circuit in *American Petroleum Institute v. Train*, —F.2d—, No. 75-1404 (10th Cir., decided December 15, 1975), addressed the jurisdictional issue as a matter of bare statutory interpretation without the benefit of an administrative record. The court of appeals affirmed a district court's dismissal of a complaint filed to obtain review of EPA's regulations for existing petroleum refineries. The court had accelerated the appeal to decide the jurisdictional question before having briefing and argument of protective petitions for review which had been filed. The court held that it and not the district court had jurisdiction "because the Administrator has not only claimed the power but also has acted to promulgate regulations under § 301", whether or not the Administrator actually had statutory authority to do so. (Slip opinion, at 6.)

In sum, taken with the Fourth Circuit's decision in the present case, the courts of appeals have reached the following four separate positions on the issues presented here:

(1) EPA has no power to issue limitations by regulation under Section 301. Rather limitations are to be established by permit-issuing authorities in Section 402 permit proceedings using guideline regulations issued under Section 304(b). District courts have jurisdiction to review the guideline regulations. *CPC International Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975).

Petitioners take this position.

(2) EPA has power to issue limitations by regulation under Section 301. The limitations are to be ceilings, and guideline regulations are to provide a range of values below the ceiling for the use of permit-issuing authorities in resolving a discharge permit for individual plants. Impliedly, courts of appeals have

¹⁷ The Seventh Circuit did not address in any respect the Administrator's obligations under Section 304. (See slip opinion, at 9 n.13.)

jurisdiction to review the limitation-guideline regulations. *American Iron and Steel Institute v. Environmental Protection Agency*, —F.2d—, No. 74-1640 (3d Cir., decided November 7, 1975).

None of the parties in any of the cases decided by a court of appeals has taken this position.

(3) EPA has power to issue limitations by regulation under Section 301. No place in the statutory scheme is assigned to guideline regulations under Section 304. The courts of appeals have jurisdiction to review limitations regulations. *American Meat Institute v. Environmental Protection Agency*, —F.2d—, No. 74-1394 (7th Cir., decided November 24, 1975), along with the district court's decision in the present case.¹⁸

From February 25, 1974 to the present, EPA has taken this position.

(4) Even if the Administrator has no power to issue limitations by regulation under Section 301, the guideline regulations mandated by Section 304(b) are referred to in, and are "the key to the attainment of the objectives set forth in § 301". Thus, the guideline regulations issued by the Administrator under Section 304(b) "should properly be considered to be pursuant to provisions of § 301" Review of the guideline regulations consequently is in the courts of appeals. *E. I. du Pont de Nemours & Co. v. Train*, —F.2d—, No. 74-2237 (4th Cir., decided December 30, 1975) (Appendix A, at 11-a).¹⁹

Parties in a number of the cases have advocated this result, albeit on somewhat different reasoning.

¹⁸ A similar position was also adopted by Judge Pratt in *American Paper Institute v. Train*, 381 F. Supp. 553 (D.D.C. 1974), appeal pending, No. 74-1967 (D.C. Cir.).

¹⁹ The Tenth Circuit's decision in the *American Petroleum Institute* case arguably reaches this result, albeit by a different route. However, the Tenth Circuit's decision would allow action by the Administrator, even if wholly unauthorized, to establish the jurisdiction of a court by the citation of statutory provisions in the preamble to regulations. As the Fourth Circuit noted in its opinion, a court's jurisdiction reflects a power conferred by Congress and is determined by the Court, not by the Administrator through the device of statutory citation. (*E. I. du Pont de Nemours & Co. v. Train*, *supra*, Appendix A, at 12-a.)

As Judge Adams observed, "[t]he conflict of interpretation between [among] the Circuits does not initiate, but certainly perpetuates confusion in the administration of the legislation." *American Iron and Steel Institute v. Environmental Protection Agency*, *supra*, concurring slip opinion, at 4. This Court should grant certiorari and resolve the conflict on these very important issues. Judge Adams correctly expressed the reasons why this Court's action is essential:

"Regardless of the merits of the respective positions of the Eighth Circuit and this Court, both have had to arrive at their divergent interpretations of this fundamental aspect of the Act by inferences from ancillary provisions, and by deciphering the legislative intent from reading scraps and bits of a convoluted legislative history.

"The failure to provide a clear procedural structure on so basic a matter in the administration of the Act is disquieting. In one sense, the difficulty of interpretation imposed here is of little consequence; it is the work of the courts to explicate the laws, no matter how complex their structure. In this instance, however, statutory vagueness inflicts harm on the purposes of the Act and impels the courts to determine the allocation of authority between the national and state governments in the administration of this program. The conflict of interpretation between the Circuits does not initiate, but certainly perpetuates confusion in the administration of the legislation. Under these circumstances, neither the states nor the Administrator, nor the industries and municipalities which are to be regulated by the Act, can be confident which agency possesses the legal authority to promulgate effluent limitations. The result of such incertitude is delay in the implementation of the substantive provisions of the Act while the concerned parties engage in costly litigation to determine the legal powers of each enforcement agency. Such controversy postpones the achievement of the Act's lofty objectives, and imposes a burden on the Courts of Appeals and the Supreme Court which they might have been spared by careful drafting." (*American Iron and Steel Institute v. Environmental Protection Agency*, *supra*, concurring slip opinion, at 4-5.)

II. This Case Appropriately Presents These Very Important Questions.

The courts of appeals have found the questions presented here to be quite difficult. In several instances the issues were made even more troublesome by the failure of the parties to address them directly. This case does not present any such problems.

Throughout the proceedings in both the district court and the court of appeals, the parties focused upon the issues of jurisdiction and statutory construction. The courts suffered no procedural impediment to reaching the issues and to deciding them.

The case also carries with it the full administrative record of the Administrator's action in issuing the guideline regulations for this industry. In the Fourth Circuit, the case was consolidated for decision with the contemporaneously-filed petitions for review. Thus when it issued its decision, the court of appeals had before it the administrative record and the briefs of the parties on the technical issues relating to the record in addition to the briefs on the legal issues here presented.

In sum, the case fully and fairly presents the questions stated, on a complete record, and after extensive consideration both by the court of appeals and by the district court.

III. This Case Presents Questions Respecting The Proper Roles Of Congress And The Judiciary In Resolving The Proper Forum For Initial Review Of Informal Rulemaking Action.

The opinion of the court of appeals relies heavily for its results upon "[t]he practical difficulties" of a determination that review of guideline regulations was initially in the district courts. (Appendix A, at 10-a, n.5.) The court noted that review of the EPA's issuance of standards for new plants was unquestionably in the courts of appeals under Section 509(b)(1)(A). District court review of

guideline regulations would thus result in bifurcated review between the two courts. (*Id.* at 10-a.) Since Congress had not affirmately expressed a desire for such a result, the court of appeals concluded that Congress had not intended it. (*Id.*)

The court of appeals, however, failed to consider the countervailing practical difficulties arising from its decision. For example, Section 509(b)(2) forbids in enforcement actions the raising of a defense that regulations are invalid if review could have been had under Section 509(b)(1):

"(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

Moreover, Section 509(b)(1) ordinarily allows review only if a petition is filed within 90 days after the Administrator's action:

"Any such application [for review in the court of appeals] shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day."

These are harsh measures under any circumstances. They are especially harsh for litigants who, upon reading the special review provisions which did not mention regulations under Section 304(b), could not fairly conclude that the special review provisions applied to guideline regulations issued under Section 304.

Various pragmatic reasons for assigning review of informal rulemaking action to one court or another have been much mooted recently by both judges and commentators.²⁰

²⁰ E.g., Judge Clark of the Fifth Circuit, writing in concurrence to that court's decision in *Texas v. Environmental Protection Agency*, 499 F.2d 289 (5th Cir., 1974), called for district court review of regulations,

The discussion of such policy factors has, however, largely been confined to a consideration of reasons for Congress to write legislation in one fashion or another. In contrast, here the courts are considering such policy factors in reaching decisions which would operate retroactively to deprive unsuspecting persons or groups of any review, given the aforementioned restrictions present in paragraphs 509(b)(1) and (2).

The policy questions concerning the appropriate forum for review must therefore have a restricted role in this case, notwithstanding their importance in a legislative context. Congress decides the forum for review, not the courts. The court of appeals, however, because it was impressed with certain practical considerations, construed the Act as conferring initial jurisdiction on the courts of appeals. The court could not point to any provision in the Act establishing such a special review. And in the absence of such a special provision, the normal rule provides for initial review in the district courts. But since the court felt the normal rule was impractical, the court viewed the silence of Congress as to special review²¹ as being equivalent to the position that the Act is ambiguous, *i.e.*, that the "Act is not clear". (Appendix A, at 10-a, n.5.) Under these circumstances, the decision below raises the question whether "practical" reasons justify a construction which reads special provisions for review into the statute when Congress has made no such provision expressly.

emphasizing the ability of a trial judge to take evidence and to sift facts. In contrast, a recent article by Professors Currie and Goodman advocated that review of "important" regulations be had initially in the courts of appeals, because such regulations ordinarily would have broad and significant scope and because a correct decision was more likely in the courts of appeals by virtue of the collegial decision-making process. (See Currie and Goodman, *Judicial Review Of Federal Administrative Action: Quest For The Optimum Forum*, 75 Colum. L. Rev. 1, 53-54 (1975).

²¹ As Judge Widener said in the court of appeals, Congress could have solved the issues in this case by "[a] simple declaratory sentence, or even a phrase, or a word" (Appendix A, at 10-a, n.5.)

CONCLUSION

The questions presented raise issues of national and lasting importance upon which a four-way conflict in decisions among the courts of appeals has arisen. The issues are fully and fairly presented for decision by this Court in the present case. The petition should be granted.

Respectfully submitted,

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JANUARY 9, 1976

APPENDIX A

**United States Court of Appeals
FOR THE FOURTH CIRCUIT**

No. 74-2237

E. I. DU PONT DE NEMOURS AND COMPANY, OLIN CORPORATION, FMC CORPORATION, AMERICAN CYANAMID COMPANY, MONSANTO COMPANY, THE DOW CHEMICAL COMPANY, ALLIED CHEMICAL CORPORATION AND HERCULES, INC.

Appellants

v.

RUSSELL E. TRAIN, as Administrator, Environmental Protection Agency, and JOHN R. QUARLES, as Deputy Administrator, Environmental Protection Agency

Appellees

On appeal from the United States District Court for the Western District of Virginia, at Roanoke, James C. Turk, Chief District Judge.

Argued April 22, 1975 Decided Dec. 30, 1975

Before RIVES* and BREITENSTEIN**, Senior Circuit Judges, and WIDENER, Circuit Judge.

Robert C. Barnard (Douglas E. Kliever and Charles F. Lettow, Cleary, Gottlieb, Steen and Hamilton, John L. Walker Jr., on brief) for Appellants; Kathryn A. Oberly, Attorney U.S. Department of Justice, Paul R. Thomson, Jr., Assistant United States Attorney, (Wallace H. Johnson, Assistant Attorney General, Alan G. Kirk, II, Assistant Administrator for Enforcement and General Counsel, Edmund B. Clark, Bruce J. Chasan, Attorneys, U.S. Department of Justice, Ray E. McDevitt, Attorney, Environmental Protection Agency, on brief) for Appellees.

* Senior Circuit Judge, U.S. Court of Appeals for the Fifth Circuit.

** Senior Circuit Judge, U.S. Court of Appeals for the Tenth Circuit.

WIDENER, Circuit Judge:

This is an appeal from a judgment of the United States District Court for the Western District of Virginia dismissing appellants' action for lack of subject matter jurisdiction. Suit was filed in the district court by the appellants, eight chemical manufacturers, who sought review of certain regulations promulgated under the Federal Water Pollution Prevention and Control Act of 1972. 33 USC § 1251 et seq (hereinafter the Act). These regulations, which purport to establish effluent limitations for inorganic chemicals, were issued by the Administrator of the Environmental Protection Agency (EPA), appellee herein, on March 12, 1974, and consist of:

- (1) Standards of performance for new plants.
- (2) Pretreatment standards for new plants discharging wastes into municipal treatment plants.
- (3) Effluent limitations for existing plants. 39 Fed. Reg. 9612 et seq, 40 CFR 415.

The only question presented in this appeal is whether the district courts have jurisdiction to review effluent limitations regulations issued by the Administrator to control effluent discharges from existing plants. A necessary corollary is whether the courts of appeals have jurisdiction under § 509 of the Act, 33 USC § 1369(b)(1), to review, on direct petition for review, regulations for existing plants, for if we have the jurisdiction, the district courts do not.¹ We conclude for the reasons stated below that the

¹ Section 509 provides in relevant part:

"(b)(1) Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402 may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person."

No question is made here of any concurrent jurisdiction of the district courts and the courts of appeals, and we see nothing in the statute to indicate that Congress intended such concurrent jurisdiction. As noted in *Passenger Corp. v. Passenger Association*, 414 US 453, 458 (1974), "[a] frequently stated principle of statutory con-

courts of appeals do have jurisdiction to review directly the regulations in question, and, therefore, the judgment of the district court must be affirmed.

As the district court noted, the issue presented was largely one of first impression. Although the matter has now been considered directly or indirectly by some few courts, it is yet relatively new and we think it appropriate that we ascertain the intent of Congress in adopting the Act in its present form by looking to the language of the statute itself and its legislative history, as well as the decisions on the subject. The original Act dates from 1948, but did not assume its present form until 1972 when the then existing statutory language was extensively revised. The object of these revisions, as noted in the body of the statute itself, was and is the restoration and maintenance of the chemical, physical, and biological integrity of the nation's waters. 33 USC § 1261. This goal is to be accomplished primarily through the control of pollutants discharged into navigable waters. It should be kept in mind that the 1972 amendments changed the emphasis in the statutory scheme of water pollution control from that of regulating the quality standard of the body of water involved to regulating not only the quality standard of the body of water but also the quality of effluent discharged into the body of water. Compare the various statutes itemized in footnotes to 33 USCA § 1251, et seq; and see, e.g., Senate Report 92-214, dated October 28, 1971; House Report 92-911 dated March 11, 1972; *CPC International v. Train*, 515 F.2d 1032, 1034-36 (8th Cir. 1975).

In the course of adopting the 1972 amendments, a great deal of attention was focused on the proper function of the States in the regulation and control of overall water quality. This is reflected in Congress' concern, written

struction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." Cf. § 505(a) of the Act, 33 USC § 1365(a), which specifically confers jurisdiction on the district courts for certain actions under the statute. *NRDC v. Train*, 7 ERC 1123 (D.C. Cir. 1974).

into the statute, that the "primary responsibilities and rights of the States to prevent, reduce and eliminate pollution be preserved." 33 USC § 1251(b). Although the United States in the last analysis regulates, in most cases, the amount of pollution discharged into the nation's waters, the States, through the permit granting plan (§ 402, 33 USC § 1342), are intended to take a large part in the administration and application of the statutory plan, including the application of regulations issued by the EPA as well as the application of the statute.² There is here no need to, and we do not, express an opinion as to the extent, construction, effect, or application of any regulation issued by EPA.

Central to the statutory framework within which the permit system is to operate are the regulations providing for or establishing effluent limitations. The EPA contends that the Act contemplates that the Administrator promulgate actual effluent limitations which will be uniformly applied in issuing permits under the Act.³ According to its

² For a good general discussion of the statute through the eyes of EPA's Assistant General Counsel, see Zener, *The Federal Law of Water Pollution Control*, Federal Environmental Law, 683 (West 1974).

³ Section 402, 33 USC § 1342, establishes the procedure for the issuance of permits under the Act. It states:

"(a)(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under section 301, 302, 306, 307, and 403 of the Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines necessary to carry out the provisions of this Act.

"(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

....

"(b) At any time after the promulgation of the guidelines required by subsection (h)(2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for dis-

construction, Congress intended that the Administrator issue effluent limitations through regulations promulgated under § 301(b), 33 USC § 1311(b). That section provides: The Administrator asserts that he has combined his rule-making authority under this section with that specifically provided for under § 304(b), 33 USC § 1314(b), to arrive at the comprehensive set of regulations which are here

charges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such program unless he determines that adequate authority does not exist. . . .

....

"(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

"(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act."

"(b) In order to carry out the objective of this Act there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act. . . .

....

(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable . . . as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act."

under review. Since § 509 of the Act states that actions of the Administrator under § 301 are directly reviewable by courts of appeals, the EPA asserts that the district court was correct in dismissing the complaint for lack of jurisdiction.

Appellants, on the other hand, while not challenging the right of this court to directly review any action of the Administrator under § 301, contend that he lacks authority to issue effluent limitation regulations under the provisions of that section. They argue that the language of § 301 requires only that effluent limitations be "achieved," not that they be independently established and achieved. Thus, according to their interpretation of the Act, § 301 merely sets forth the statutory objectives to be attained, and the means of actually reaching these objectives are set out in § 304 of the Act, 33 USC § 1314, which states in part:

"(a)(1) The Administrator . . . shall develop and publish . . . criteria for water quality. . . .

"(b) For the purpose of adopting or revising effluent limitations under this Act the Administrator shall . . . publish . . . regulations providing guidelines for effluent limitations. . . . Such regulations shall—

"(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act. . . ."

The challenged regulations must, therefore, according to appellants, be deemed to have been issued under § 304(b) and neither under § 301 nor a combination of § 301 and § 304(b) as the EPA asserts. Based upon this interpretation of the statutory provisions in issue, appellants contend that review in the courts of appeals pursuant to § 509(b)(1) is not available and that the action was properly brought before the court below in accordance with the provisions of the Administrative Procedure Act, 5 USC § 701 et seq. As a corollary to this construction, appellants seek a ruling that the effluent limitations for existing point sources issued by EPA are invalid because

they say the Administrator had no authority to issue them under § 301, and could only have issued them under § 304(b).

The case of *CPC International, Inc. v. Train*, 515 F.2d 1032 (8th Cir. 1975), appears to agree with appellants' interpretation of the statutory provisions involved. In that case, the court stressed the fact that § 301 provides the Administrator with no separate power to promulgate effluent limitations for existing point sources. The court noted,

"[o]ther sections of the Act demonstrate that the omission of such a provision [providing for the issuance of regulations under § 301] was not an oversight, for Congress provided unambiguously for the promulgation of national standards in other sections of the Act. Nationally promulgated standards were expressly mandated for § 306(b)(1)(B). . . ." 515 F.2d at 1038.

Thus, the court concluded that jurisdiction to review such actions of the EPA, which were deemed to have been taken in accordance with § 304(b), did not lie in the courts of appeals because the EPA could not promulgate effluent limitations for existing sources by regulations under § 301.

The court below, on the other hand, ruled that the effluent limitations standards at issue were promulgated pursuant to § 301 "apart from § 402 permit proceedings," and, as a result, it lacked jurisdiction to review. The court pointed first to § 509(b)(1)(E), which refers to judicial review of the Administrator's actions "in approving or promulgating any effluent limitation[s] or other limitation[s] under sections 301, 302, or 306" as supportive of the proposition that effluent limitations could be issued under § 301. In addition, the court noted that § 402(a) requires that permits issued thereunder meet the applicable requirements under § 301, and we note that under § 509(b) review of the action of EPA in issuing a permit is in the courts of appeals. The district court also noted it was of opinion the Administrator had authority under § 301(b)

to promulgate the regulations pursuant to his authority under § 304(b) and concluded that challenges to the effluent limitations must be handled in the courts of appeals.

This or related questions have also been considered by several other courts faced with challenges to EPA regulations under this statute. The Third Circuit, in *American Iron and Steel Institute v. EPA*, 8 ERC 1321 (3d Cir. 1975), disagreed with the reasoning of the Eighth Circuit in *CPC* and concluded that the Administrator was authorized to issue single number effluent limitations under § 301. The jurisdictional question was apparently not raised there. That court considered such effluent limitations as a uniform ceiling, the maximum amount of pollutant in effluent discharge which is permissible. And it also gave effect to § 304 by requiring compliance with it by EPA in preparing meaningful guidelines and addressing statutory factors for application to industry. Since it found § 304 was not complied with by EPA, the court set aside the issued effluent limitations because the limitations might have been less stringent if the statute (§ 304) had been followed in issuing the guidelines and consideration of statutory and individual factors.

In *American Meat Institute v. Environmental Protection [sic, Agency]*, No. 74-1394 (7th Cir. 1975), the jurisdictional problem was also considered. The court held it had jurisdiction for it considered the effluent limitations were issued under § 301 of the Act. The court stated "the most rational reading of the language of the Act is that § 301 is a source of authority to promulgate effluent limitations, independent of the § 402 permit procedure." This part of the holding is then quite similar to that of the district court in our case. The Seventh Circuit also depended on *Train v. National Resources Defense Council*, 421 US 60 (1975); gave weight to the EPA's construction of the statute; and found it was "sufficiently reasonable to preclude . . . [the court] from substituting its judgment for that of the agency." We express no opinion as to the validity of this latter propo-

sition in the context of a court determining its own jurisdiction which, of course, is conferred by Congress, *Lockerty v. Phillips*, 319 US 182, 187 (1943), and we need not in order to arrive at our conclusion.

In *American Petroleum Institute v. Train*, 7 ERC 1795 (D. Colo. 1974), the court concluded it lacked jurisdiction since the challenged regulations were issued under § 301 as well as § 304, and review should be had in the courts of appeals "even should the Administrator have interpreted his authority under [§ 301] incorrectly." Finally, the court, in *American Paper Institute v. Train*, 381 F. Supp. 553 (D.D.C. 1974), likewise found it lacked jurisdiction to review the challenged regulations even if they were guidelines under § 304 for in that event they would be "only an aid in establishing effluent limitations and since limitations, not guidelines, comprise the standards of performance for the issuance of permits, plaintiff [could not] be heard to complain that it [was] 'adversely affected or aggrieved' by guidelines, the criteria of section 10(a) of the APA."

Thus, the parties to this dispute point to authority in support of their respective positions. We are of opinion, however, that the central question addressed by both the Eighth Circuit and the district court below, as well as some of the other cases, regarding the EPA's authority under § 301 should not necessarily be dispositive of the jurisdictional issue. Both courts have decided the substantive question of authority to issue the regulations under § 301 in order to reach the question of jurisdiction. With all deference to both courts, we think it unnecessary to decide the substantive question of authority to issue the regulations under § 301 alone in order to decide the question of which federal court has jurisdiction to review them.

We are impressed, as was the court below, by the express language of § 509(b)(1)(E) which refers to "review of the Administrator's action . . . in approving or promulgating any effluent limitation or other limitation under

section 301, 302, or 306." It is significant to note that section 306 provides for the issuance of regulations "establishing Federal standards of performance for *new* sources [of pollutants]." 33 USC § 1316 (emphasis added). Section 301, by way of contrast, is concerned with existing sources.⁴ Were we to accept appellants' interpretation of the Act, review of regulations governing existing sources would lie in the district courts under the Administrative Procedure Act, while review of new source standards would be before the courts of appeals under § 509.⁵ We do not conclude that Congress intended for review to be bifurcated in this manner.

While there is little legislative history relating to § 509, it is highly significant that the committee reports make no mention of any division of judicial review. It is clear that the House and Senate conferees disagreed over whether there should be judicial review in the district courts or the courts of appeals. Yet, there is no indication of any

⁴ The terms "source" and "new source" are defined in the Act as follows:

"(2) The term 'new source' means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

"(3) The term 'source' means any building, structure, facility, or installation from which there is or may be the discharge of pollutants." 33 USC § 1316(a) (Supp. 1975).

⁵ The practical difficulties occasioned by such a review procedure are illustrated by means of an example. Assume that an existing plant licensed under the Act expands. It is possible that the expanded portion of the plant would constitute a new point source within the meaning of § 306. In that event, the plant could be compelled to maintain two actions simultaneously, one in the district court and another in the court of appeals, in order to challenge the action of the Administrator. The jurisdictional overlap would only add to the complexities already inherent in the statute.

Recognizing the classical prohibition on residents of glass houses who throw rocks, with the Third Circuit we are yet constrained to say the Act is not clear. A simple declaratory sentence, or even a phrase, or a word, could have solved this knotty question, which relates to a substantial part of the industry in the country.

compromise agreement providing for divided review of the EPA standards. To the contrary, the Senate appears to have prevailed on this point. Leg. History (Conference Report), p. 330. A literal reading of the Conference Report without reference to the statute supports the position we take here.

In the House Report discussing judicial review, it was noted that "with the number and complexity of administrative determinations that the legislation requires there is a need to establish a clear and orderly process for judicial review." Although the House Bill originally provided for review in the district courts, this report indicates that Congress did not intend for the actions of the Administrator to be subjected to the complexities inherent in a system of review divided between different courts. Rather, it appears to have been its desire that administrative actions be reviewable, but in a manner not likely to impede enforcement unduly. Leg. History (House Report), p. 823.

The EPA contends that, this being the intent of Congress, § 301 must be viewed as authorizing the promulgation of effluent limitation regulations. Otherwise, they argue, § 509's reference to § 301 would be meaningless. We are not persuaded that this conclusion must necessarily follow in order for this court to find jurisdiction under § 509.

Even if § 301 merely sets out the technological objectives to be attained under the Act, courts of appeals may properly assume jurisdiction to review actions of the Administrator in issuing regulations to achieve these objectives. If § 301 is to be viewed in the manner advocated by the appellants, then § 304(b) must necessarily be deemed the key to the attainment of the objectives set forth in § 301. Thus, to obey the mandate of § 301, "guidelines for effluent limitations" must be promulgated under § 304(b). Construed in this light, any action taken by the Administrator under § 304(b) should properly be considered to be pursuant to the provisions of § 301 and, therefore, reviewable by this court under § 509.

By enacting § 509(b), Congress established a statutory plan to be followed to obtain judicial review of agency actions under the Act. Only those courts upon which Congress has bestowed authority have jurisdiction. See *Whitney Bank v. New Orleans Bank*, 379 US 411, 420, 422.

The district court correctly held it had no jurisdiction. None is conferred upon it by the statute involved. In federal courts, "[j]urisdiction is essentially the power conferred by Congress to decide a given type of case one way or the other." *Hagans v. Lavine*, 415 US 528, 538. In its exercise of its statutory jurisdiction, this court determines whether the Administrator acted within his statutory authority.

Since we are of opinion that Congress has conferred on the courts of appeals the power to decide the merits of this case one way or the other, and not conferred such power on the district courts, we think the judgment of the district court should be affirmed.

Accordingly, the district court was without jurisdiction, and its judgment, if not its entire opinion, is

AFFIRMED.

JUDGMENT

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 74-2237

E. I. DU PONT DE NEMOURS AND COMPANY, OLIN CORPORATION, FMC CORPORATION, AMERICAN CYANAMID COMPANY, MONSANTO COMPANY, THE DOW CHEMICAL COMPANY, ALLIED CHEMICAL CORPORATION AND HERCULES, INC.

Appellants

v.

RUSSELL T. TRAIN, as Administrator, Environmental Protection Agency, and JOHN R. QUARLES, as Deputy Administrator, Environmental Protection Agency

Appellees

Appeal from the United States District Court for the Western District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby affirmed.

WILLIAM K. SLATE, II

Clerk

APPENDIX B

**E. I. DuPONT de NEMOURS AND COMPANY et al.,
Plaintiffs,**

v.

**Russell E. TRAIN et al., Defendants.
Civ. A. No. 74-57.**

United States District Court,
W. D. Virginia,
Roanoke Division.
Sept. 27, 1974.

Robert C. Barnard, Douglas E. Kliever, and Charles F. Lettow, Cleary, Gottlieb, Steen & Hamilton, Washington, D. C., John L. Walker, Jr., Woods, Rogers, Muse, Walker & Thornton, Roanoke, Va., for plaintiffs.

Bruce J. Chasan, Dept. of Justice, Washington, D. C., Leigh B. Hanes, Jr., U.S. Atty. for the Western District of Virginia, Roanoke, Va., for defendants.

OPINION AND ORDER

TURK, Chief Judge.

This suit is brought by eight chemical manufacturers seeking declaratory and injunctive relief against the Administrator and Deputy Administrator of the Environment Protection Agency (EPA). The case is presently before the court pursuant to plaintiffs' motion for partial summary judgment and declaratory judgment and the defendants' motion to dismiss for lack of subject matter jurisdiction or alternatively to stay the proceedings.

Plaintiffs ultimately seek to have this court enjoin and set aside certain regulations promulgated by the Administrator of the EPA governing the effluent discharge of sulfuric acid plants on grounds that they are arbitrary, capricious, not supported by substantial evidence, beyond

the statutory authority of EPA and not in accord with procedures of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. § 1251 et seq. ("The Act") and the Administrative Procedure Act. Resolution of these allegations requires factual determinations and they are accordingly not now ripe for disposition. However, plaintiffs also raise several issues of statutory construction not dependent upon factual determinations and which may result in the disposition of the case at this time. The following issues are now before the court for resolution:

1. Whether the Administrator of the EPA has the authority under section 301(b) of the Act to issue regulations establishing effluent limitations for sulfuric acid plants;
2. Whether the regulations in question conform to section 304(b) of the Act and the notice and public participation provisions of the Administrative Procedure Act; and
3. Whether this court has jurisdiction to review the regulations in question and the procedures by which they were promulgated, or whether as defendants contend, this suit should be dismissed for lack of subject matter jurisdiction.

THE STATUTE

The Federal Water Pollution Control Act Amendments of 1972, while technically amending the Federal Water Pollution Control Act of 1965, 33 U.S.C. § 1151 et seq., is in effect a comprehensive statute in its own right. Section 101(a) of the Act states as its objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and states as two of its goals "that the discharge of pollutants into the Navigable waters be eliminated by 1985" and "that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983." Of primary interest to this suit are sec-

tions 301, 304 and 402, which establish the regulatory framework for achieving the above goals and section 509(b)(1) providing for judicial review of the Administrator's actions.

Section 301(a) makes it unlawful for any person to discharge any pollutant except as in compliance with certain enumerated sections of the Act including section 301. Section 301(b) then states:

"In order to carry out the objective of this Act, there shall be achieved—

"(1)(A) not later than July 1, 1977, effluent limitations for point sources . . . (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act. . . .

"(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources . . . which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act. . . ."

Section 304(b) to which section 301(b) refers provides:

"For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of [enactment of this title], regulations, providing guidelines for effluent limitations, and at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

"(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources . . .; and

"(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources . . . within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301 of this Act shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

"(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources . . .; and

"(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act to be applicable to any point source . . . within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

"(3) identify control measures and practices available to eliminate the discharge of pollutants from

categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants."

The statutory scheme further provides for a national system of discharge permits known as the "National Pollutant Discharge Elimination System" (NPDES) to insure that the control levels established by the Act are achieved. Thus, section 402(a)(1) states:

"Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for a public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308 and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of the Act."

Section 402(b-e) further provides that the permit issuing authority be given to the individual states which submit a program which meets the requirements of the Act, although the Administrator retains the power to prevent the issuance of a permit he deems to be "outside the guidelines and requirements of this Act." § 402(d)(2).

Section 509(b) provides for judicial review of the Administrator's determinations:

"(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or treatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306, and (F) in issuing or denying any permit under section 402, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon appli-

cation by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

"(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

THE REGULATIONS

On August 6, 1973, the EPA published notice of proposed rulemaking "with respect to effluent limitations, guidelines, standards of performance and pretreatment standards for new sources." 38 Fed.Reg. 21202. On October 11, 1973, EPA published notice of proposed rulemaking for 40 C.F.R. Part 415, "Effluent Limitations Guidelines and Standards of Performance and Pretreatment for Inorganic Chemicals Manufacturing Point Source Category." 38 Fed.Reg. 28174 et seq. These proposed regulations subdivided the inorganic chemicals manufacturing category into twenty-two sub-categories, each representing a different chemical, including sulfuric acid. With respect to sulfuric acid, the proposal discussed the three principal methods of manufacture—double absorption plants, single absorption plants and spent acid plants—and stated that the proposed regulations would not apply to spent acid plants. However, the proposed regulations for both single and double absorption plants established the standard of "no discharge of process waste water pollutants to navigable waters" both "after application of the best practicable control technology currently available" and "after application of the best available technology economically achievable." 38 Fed.Reg. 28192. After receiving additional comments, including comments from seven of the plaintiffs to this suit, 39 Fed.Reg. 9612, final regulations were issued on March 12, 1974 for 40 C.F.R. Part 415 (Inorganic Chem-

icals Manufacturing Point Source Category). The Administrator declined to change the basic proposed regulations for sulfuric acid production, and the "no discharge of process waste water pollutants" went into effect. 40 C.F.R. §§ 415.212, 415.213, 39 Fed.Reg. 9634. The proposed regulations for sulfuric acid production (as well as other sub-categories in the Inorganic Chemicals Manufacturing Group) were modified with regard to the limitations representing best practicable control technology currently available (40 C.F.R. § 415.212), by providing that the "no discharge" standard might be adjusted for certain plants by the Regional Administrator or the State in issuing an NPDES permit; according to the regulation, such an adjustment could be made on the basis of a showing that certain factors peculiar to the discharger are "fundamentally different" than the factors considered in formulating the regulation. 40 C.F.R. § 415.212, 39 Fed.Reg. 9634.

I

Plaintiffs' statutory construction argument is essentially that the regulations for sulfuric acid plants are not valid effluent "guidelines" complying with the requirements of section 304(b). They contend that the word "guidelines" in section 304(b) is a term of art which contemplates the administrative promulgation of broadly outlined regulations to serve as a starting point for the development of specific restrictions which would then be individualized for each discharger by way of permits issued by the Regional Administrator or State pursuant to § 402 with such permits embodying the "limitations" to be "achieved" pursuant to § 301. In support of this construction plaintiffs note that § 304(b) requires that the guidelines to be published as regulations contain two elements: (1) the degree of effluent reduction "attainable" by 1977 using the "best practicable control technology currently available" and by 1983 using the "best available control measures and practices achievable" for classes and categories of

point sources; and (2) a specification of the factors to be taken into account in determining the control measures applicable to point sources within such categories or classes in order to attain these goals. Thus plaintiffs argue that the regulations were intended to be flexible guidelines and not prescriptive rules applicable across the board to all plants in a given category (i. e. sulfuric acid plants); and the permit granting agency would look to the guidelines for determining the degree of effluent limitation attainable for a given plant.

Plaintiffs specifically contend that the regulations for sulfuric acid plants fail to discuss the statutory factors and hence provide no guidance to the permit-granting authorities. Furthermore, they contend that the EPA's construction and implementation of the Act would frustrate the intent of Congress in allowing the States to play a major role in implementing the Act. They argue that by making the regulations binding prescriptions in the form of specific limitations instead of a "range" of discharge levels together with factors to be taken into account for discrete industrial categories, the EPA has deprived the States of discretion in administering the NPDES program. This is said to be contrary to the intent of Congress expressed in § 101(b) of the Act "to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution. . . ."

Based on their construction of the Act, plaintiffs then contend that review in the Court of Appeals pursuant to § 509(b)(1) of the Act is not available to challenge the regulations constituting effluent guidelines under § 304(b). Since § 509(b) provides only for review of EPA actions under sections 301, 302, 306, 307 and 402 of the Act, review of other regulatory actions by the EPA as well as certain other agencies empowered to act under the Act would proceed under the Administrative Procedure Act, 5 U.S.C. § 702, and through other jurisdictional statutes such as

the Mandamus and Venue Act of 1962, 28 U.S.C. § 1361.¹ Thus plaintiffs argue that review of § 304(b) guidelines is not encompassed by § 509(b). In support of this position, plaintiffs point out that each of the sections specified in § 509(b) allow regulatory actions by the EPA which may then be enforced by the Administrator pursuant to § 309 or by "any citizen" pursuant to § 505 by way of a civil suit in the district court. They argue that actions taken pursuant to sections not specified in § 509(b), including guidelines issued pursuant to § 304(b), require further implementing steps, and hence a decision of broad precedential effect by a Court of Appeals was not deemed necessary in the first instance.

In contrast, defendants contend that the Act contemplates that the Administrator promulgate actual effluent limitations which will then be uniformly applied by the Administrator or the states in issuing NPDES permits under section 402. According to their construction, section 304(b) guidelines have no direct relationship to permit proceedings under section 402, but merely provide a basis for establishing the effluent limitations. They accordingly argue that the regulations are effluent limitations properly established pursuant to section 301(b).

Defendants view the regulations in question, 45 C.F.R. §§ 415.212, 415.213, as valid effluent limitations promulgated pursuant to section 301(b) with the fixed number of zero for the discharge of process waste water from sulfuric acid plants being the established limitation. In addition they contend that 45 C.F.R. Part 415 establish the "guidelines" required by section 304(b) by subdividing the inorganic chemical manufacturing group into 22 sub-

¹ As a basis for jurisdiction to review what they consider to be section 304(b) "guidelines" plaintiffs also cite 28 U.S.C. §§ 1331, 1332, 1337 and 1651; the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202; and the Administrative Procedure Act, 5 U.S.C. §§ 701-706.

categories of specific chemicals.² Thus defendants contend that the regulations are "guidelines" issued pursuant to section 304(b) by way of subcategorization, but are effluent limitations in terms of the specific numerical restrictions imposed.

On the basis of this construction, defendants argue that jurisdiction to review the regulations is exclusively in the Court of Appeals pursuant to section 509(b)(1)(E). Furthermore, it is asserted that since the "guidelines" are intertwined with and provide a definitional basis for the limitations, they should also be reviewed in the Court of Appeals.

II

The issue of statutory construction presented in this case is one of first impression³ in which the court must seek the intent of Congress from the words and structure of the statute and its legislative history. Although the varying interpretations of the Act presented by the parties both find support in the statute and its history, for the reasons which follow the court concludes: (1) that the Administrator was authorized to promulgate by regulation the

² The Administrator's approach was explained in the regulations as follows:

The approach taken in developing effluent limitations guidelines and standards of performance for the inorganic chemicals manufacturing industry was to examine all variables and segment the industry into workable subcategories consistent with these variations. Twenty-two subcategories have been established based on the chemical product manufactured. In cases where two dissimilar processes are used to manufacture the same product separate limitations have been established within the subcategory. Thus, ranges are provided for, as are other factors, by segmenting the inorganic chemicals manufacturing point source category into discrete subcategories, each with its own limitation. 39 Fed.Reg. 9612 (March 12, 1973).

³ Plaintiffs cite *Natural Resources Defense Council v. Train*, 6 E.R.C. 1033 (D.D.C. 1973) in support of their construction of the Act. That case involved a suit to compel the Administrator to publish effluent limitation guidelines after expiration of the time period established by the Act. However, that case did not consider the issue of statutory construction now presented.

effluent limitations in issue; (2) that the structural and content requirements of such regulations under section 304(b) were satisfied; and (3) that judicial review of these limitations and guidelines is exclusively in the Court of Appeals under section 509(b)(1)(E).

1.

[1] Taken as a whole, the various sections of the Act support the defendants' construction that section 301(b) effluent limitations were intended to be promulgated as regulations apart from section 402 permit proceedings. This is implicitly supported by section 509(b)(1)(E) which provides for review of the Administrator's actions "in approving or promulgating any effluent limitation or other limitation under section 301, 302, or 306. . . ." The independence of such limitations is also implicit in section 505 which provides in subsection (a) for any citizen to sue for a violation of "an effluent standard or limitation under this Act"; but even more revealing is section 505(f) which defines "effluent standard or limitation under this Act" to include six separate definitions among which are: "(1) effective July 1, 1973, an unlawful act under subsection (a) of section 301 of this Act, (2) an effluent limitation or other limitation under section 301 or 302 of this Act; . . ." or (6) "a permit or condition thereof issued under section 402 of this Act. . . ." Obviously under plaintiffs' construction of the Act the second definition quoted above would be redundant with the sixth. Plaintiffs have offered no explanation for this apparent inconsistency with their position.

Plaintiffs would avoid the implication of section 509(b)(1)(E) by construing the word "promulgating" in section 509(b)(1)(E) as applying only to section 302 and the word "approving" as having application to effluent limitations under sections 301 or 306. In support of this construction, plaintiffs point out that section 402(b) allows a state to develop a plan for issuing permits and thus displace the Administrator's authority to issue permits; and further that section 402(d) provides a check on the states

by allowing the Administrator to veto a permit issued by the state:

"(d)(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

"(2) No permit shall issue . . . (b) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the *guidelines and requirements of this Act*. (plaintiffs' emphasis).

From these sections, plaintiffs argue that the use of "approving" in section 509(b)(1)(E) was in reference to the Administrator's action in reviewing effluent limitations under section 301(b) or standards of performance under section 306⁴ which would be set by the States in permits. They further contend that such approval was a necessary element inasmuch as such a federal connection to a state program was necessary in order to justify review in the federal courts. On the other hand, plaintiffs argue that section 302⁵ provides for the promulgation of effluent

⁴ Section 306(b) provides that the Administrator shall publish regulations "establishing Federal standards of performance for new sources" within a category of sources. Plaintiffs point out that section 509(b)(1)(A) specifically provides for review of these "standards of performance." Section 306(c) authorizes the states to develop a procedure for applying and enforcing standards of performance for new sources located within the state which may then be approved by the Administrator. Plaintiffs contend that the implementation of these standards of performance would occur in permit proceedings which would be subject to approval by the Administrator in a manner similar to section 301(b) effluent limitations.

⁵ Section 302(a) authorizes the Administrator to "establish" "water quality" related "effluent limitations" when he finds that

"discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b)(2) (the technology-based limitations to be achieved by 1983), would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies. . . ."

limitations by the Administrator in certain defined situations without a provision for state implementation. This is said to explain the use of "promulgating" in section 509(b)(1)(E).

Such a construction of section 509(b)(1)(E) is unconvincing for several reasons. First, section 302 does not require that effluent limitations be "promulgated"; rather it states that "effluent limitations . . . shall be established." The court fails to see a distinction between the establishment of limitations under section 302 and the achievement of limitations under section 301(b) particularly in view of the language used in section 301(e):

"Effluent limitations, established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act."

Similarly section 302(c) provides:

"The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 301 of this Act."

Second, plaintiffs' construction of the interrelationship between section 509(b)(1)(E) and section 402(d)(1) and (2) ignores the fact that sections 402(d)(3), 402(e) and 402(f) allow the Administrator to waive review of permits issued by the States, and thus in such situations, by plaintiffs' analysis, there would be no federal judicial review under section 509(b)(1). Finally, the reference to "guidelines and requirements of this Act" in section 402(d)(2) would appear to be section 304(h) guidelines⁶ (as opposed to section 304(b) guidelines) in view of the references to "guidelines" in sections 402(b), 402(c)(1), and 402(c)(2) and 402(e) being specifically to section 304(h) guidelines.

Even more strongly suggestive of the conclusion that section 301(b) limitations were intended to be promulgated as regulations is the interrelationship between sec-

⁶ These pertain to the procedural requirements of a state-operated permit program.

tion 301(b) and 304(b). Thus the requirements of sections 304(b)(1)(A) and 304(b)(2)(A) that the Administrator publish regulations which identify the degree of effluent reduction attainable by 1977 and 1983 appears to contemplate the issuance of actual effluent limitations which are referred to in section 301(b)(1)(A) as being "defined by the Administrator pursuant to section 304(b) of this Act" and in section 301(b)(2)(A) as being "determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act. . . ."

Both plaintiffs and defendants quote the definition of effluent limitation in section 502(11) in support of their respective interpretations of the Act:

"The term 'effluent limitation' means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance."

Plaintiffs argue that since a state cannot issue regulations the definition indicates that effluent limitations do not involve regulations and that the definition contemplates that both the states and the EPA will have a shared role in establishing effluent limitations. However, the court does not perceive this definition as being inconsistent with the defendants' construction of the Act and the regulations herein challenged since the effluent limitations promulgated by the Administrator may nevertheless be "established" for a given discharger through a permit issued by a state which has satisfied the requirements of section 402.

Further support for the conclusion that NPDES permits issued pursuant to section 402 would embody the effluent limitations previously established by the Administrator is implicit in the fact that section 402(a) requires that such permits meet the "applicable requirements under section 301" but omits any reference to section 304(b) guidelines.

[2] As noted, the regulations herein challenged establish the number of zero as the effluent limitation for both

single and double absorption plants. The court is of the opinion from a consideration of the structure and wording of the Act that the Administrator had the authority to promulgate such limitations under section 301(b) pursuant to his authority under section 304(b). It follows that plaintiffs' substantive challenge to such limitations must be brought in the Court of Appeals pursuant to section 509(b)(1)(E).

2.

Plaintiffs further challenge the regulations in question for failing to specify the factors to be taken into account in determining the control measures and practices to be applicable to point sources within such categories or classes, as required by section 304(b)(1)(B) and 304(b)(2)(B). As noted, defendants argue that the subcategorization in effect establishes "guidelines" under section 304(b). They contend that variations in plant age, size, manufacturing processes, raw materials, etc. (section 304(b)(1)(B) and 304(b)(2)(B) factors) were taken into account by such subcategorization. They further argue that this approach is consistent with the statutory scheme and facilitates the achievement of reasonably uniform limitations for similar point sources under section 301 of the Act.

The court notes that although the factors were not set forth as regulations as such, the regulations do indicate that the factors were considered. The regulations in question also indicate that the effluent limitations established could be varied for an individual discharger in an NPDES permit upon a showing "that factors relating to the equipment or facilities involved, the processes applied or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. . . ." 39 Fed.Reg. 9634; 45 C.F.R. § 415.212. In addition, defendants assert (and the regulations note) that the factors in question are analysed in a "Development Document."

[3] In view of the aforementioned conclusion that sections 301(b) and 304(b) intend that the Administrator will publish effluent limitations for classes and categories of point sources, the court is of the opinion that the approach taken by the Administrator in specifying factors is in accord with section 304(b). In this regard it must be noted that the factors required to be specified under section 304(b) were not intended to exist in a vacuum. Rather, both sections 304(b)(1)(B) and 304(b)(2)(B) respectively require such factors in reference to "the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 301" and "the best measures and practices available to comply with subsection (b)(2) of section 301". Thus the statute appears to contemplate the incorporation of such factors in the effluent limitations established under section 301, which was apparently done in this case. Accordingly, the court believes that any challenge to the Administrator's consideration of various factors or the weight given to each, like the challenge to the actual numerical limitations, is in essence a challenge to the Administrator's action in promulgating effluent limitations under section 301 and must be pursued under section 509(b)(1)(E) in the Court of Appeals.

[4] The court further is of the opinion that section 509(b) is consistent with the above construction of the Act. It is reasonable to assume that by providing original judicial review in the Courts of Appeals of effluent limitations under section 509(b) along with strict time limitations and prohibitions on review by way of criminal or other civil proceedings, Congress sought to establish expeditious and consistent application of limitations.⁷ How-

⁷ There is very little legislative history relative to section 509(b). The bill as originally passed by the House provided for judicial review in the district courts whereas the Senate bill provided for review of certain administrative actions in the Court of Appeals for the District of Columbia and others in the Courts of Appeal for the appropriate circuit. H.R. 11896, 92d Cong., 2d Sess. § 509(b) (1972); S. 2770, 92d Cong., 1st Sess. § 509(b).

ever, by plaintiffs' construction of the Act, actual effluent limitations would always be individualized for dischargers in NPDES permits, thus limiting the broad precedential effect of any judicial decision approving or rejecting any such limitation. Furthermore, if plaintiffs could challenge section 304(b) guidelines in the district court and section 301(b) limitations in the Court of Appeals, this would create duplicative litigation because of the close inter-relationship between these sections and the fact that the administrative record in each suit would be virtually identical. In addition, any successful challenge to guidelines in the district court would affect the limitations which could only be challenged in the Court of Appeals and would thus hinder the goal of prompt judicial review.

3.

The legislative history of the Act is generally consistent with the stated conclusions concerning the relationship between sections 301, 304 and 402 and the Administrator's authority to establish the effluent limitations in issue. Both the House Report accompanying H.R. 11896 and the Senate Report accompanying S. 2770 indicate that the Administrator is to establish specific effluent limitations for sub-categories of point sources. Thus the House Report stated:

As required in section 304(b)(1)(A), *the administrator, by regulations, is to identify the degree of effluent reduction attainable by the application of the best practicable control technology currently available for classes and categories of point sources.* By this the Committee expects that the Administrator will concentrate on, but not be limited to, those categories of point sources enumerated in section 306(b)(1)(A) and any which the Administrator might add to that list. *The Committee expects that the identification will be in objective terms and will set out actual performance levels for the classes and categories of point sources rather than prescribing specific control techniques, processes or equipment.*" H. Rep., No. 92-911, 92d Cong., 2d Sess., 107 (1972), reprinted in Senate Committee on Public Works, Committee Print, A

Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. 1st Sess., at 794 (1973) (hereinafter "Legislative History"). (emphasis added).

The Senate Report similarly indicates that effluent limitations will be established by regulations, and in addition indicates that the defendants' approach in incorporating factors into such limitations is consistent with the statutory scheme.

"It is the Committee's intention that pursuant to subsection 301(b)(1)(A), and Section 304(b) the Administrator will interpret the term 'best practicable' when applied to various categories of industries as a basis for specifying *clear and precise effluent limitations* to be implemented by January 1, 1976. In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the age of the plants, their size and unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a range of discharge levels, above a certain base level applicable to all plants within that category. In applying effluent limitations to any individual plant, the factors cited above should be applied to the specific plant. In no case, however, should any plant, be allowed to discharge more pollutants per unit of production than is defined by that base level." S.Rep. No. 92-414, 92 Cong., 1st Sess. p. 50, U.S. Code Cong. & Admin. News 1972, p. 3716; Legislative History at 1468. (emphasis added).

Plaintiffs argue that the reference to the Administrator establishing a "range of discharge levels" supports their construction of the Act. However, by creating narrow sub-categories of point sources subject to different limitations, the Administrator has in effect created a range of discharge levels for various categories of point sources—in this case the category being inorganic chemicals manufacturing. In any case, the determination herein challenged set the limitation of "no discharge of process waste water" for two types of sulfuric acid plants, indicating that in the Adminis-

trator's opinion a range of numbers was inappropriate. Whether the substance of this decision was correct is, as noted above, to be challenged under section 509(b)(1)(E) in the Court of Appeals.

In the Conference Report on S. 2770 the following was stated with respect to section 304(b):

"In determining the 'best available technology' for a particular category or class of point sources, the Administrator is directed to consider the cost of achieving effluent reduction. *The Conferees intend that the factors described in section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of application of an effluent limitation to an individual point source within such a category or class.*

"Except as provided for in section 301(c) of the Act, the intent is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.

"The Conferees have provided, however, a mechanism for individual point source-by-source consideration in section 301(c). That section provides that the Administrator may modify any effluent limitation based on 'best available technology' to be achieved by July 1, 1983, with respect to any point source, upon a showing by the owner or operator of such point source that an effluent limitation so modified will represent the maximum use of technology within the economic capability of the operator and will result in reasonable further progress toward the goal of the elimination of the discharge of pollutants." 118 Cong.Rec. S. 16874 (daily ed., Oct. 4, 1972; Legislative History at 172. (emphasis added).

This quotation appears to be basically consistent with defendants' interpretation of the Act. Specifically it supports the defendants' construction that section 304(b) factors

may be utilized to create subcategories subject to uniform, specific effluent limitations and refutes plaintiffs' contention that such factors are to have an independent status for the purpose of establishing discharge levels for individual plants.

4.

Plaintiffs have raised a final contention concerning the promulgation of the regulations in question which is a concomitant to their other allegations based on their construction of the statute. They argue that in issuing the regulations for inorganic chemicals, the Administrator failed to adhere to the notice and opportunity-to-comment requirements of the Administrative Procedure Act, 5 U.S.C. § 553. There is apparently no dispute that notice of proposed rulemaking was published in the Federal Register on August 6, 1973 (38 Fed.Reg. 21202) and October 11, 1973 (38 Fed.Reg. 28174) and extensive comments were received from the public, including the plaintiffs. The final regulations issued on March 12, 1974 summarized the major comments received since the October 11 notice of proposed rulemaking.

The plaintiffs now contend however that they approached the proposed regulations on the assumption that such regulations would be flexible "guidelines" issued under section 304(b) and not actual effluent limitations to be mechanically applied to all plants in a given subcategory. Thus they argue that by promulgating actual effluent limitations, the Administrator rendered ineffective the notice and public participation requirements of the APA.

Although the record before the court tends to belie plaintiffs' allegations of surprise and prejudice, the court does not now decide this claim. Rather, the court is of the opinion that in view of its construction of the Act, *supra*, review of this procedural claim should also proceed in the Court of Appeals. Section 509(b)(1)(E) provides for jurisdiction in the Court of Appeals to review "the Administrator's action" in "promulgating any effluent limitation or

other limitation under section 301." This jurisdictional section is unqualified, and the court perceives no reason why review of the adequacy of notice and public participation regarding regulations which establish effluent limitations, should not proceed in the same manner as a suit challenging the substantive action of the Administrator in setting particular limitations.

To summarize, the court concludes that the regulations herein challenged are effluent limitations established by the Administrator pursuant to section 301(b) and 304(b); and that review of both the substance of such limitations and the procedures utilized in establishing the same is exclusively in the Court of Appeals pursuant to section 509(b)(1)(E). Accordingly, for the reasons stated defendants' motion to dismiss this suit for lack of subject matter jurisdiction is hereby granted.

APPENDIX C

The pertinent provisions of the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1251 *et seq.*, are as follows:

§ 1251. Congressional declaration of goals and policy

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water re-

sources, and to consult with the Administrator in the exercise of his authority under this chapter. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless

duplication and unnecessary delays at all levels of government.

§ 1311. Effluent limitations—Illegality of pollutant discharges except in compliance with law

(a) Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Timetable for achievement of objectives

(b) In order to carry out the objective of this chapter there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d) (1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2) (A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b) (2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b) (2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title; and

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 1281(g) (2) (A) of this title.

Modification of timetable

(c) The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Review and revision of effluent limitations

(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least

every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

All point discharge source application of effluent limitations

(e) Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

Illegality of discharge of radiological, chemical, or biological warfare agents or high-level radioactive waste

(f) Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters.

§ 1312. Water quality related effluent limitations

(a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b) (2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) (1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social

costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

(c) The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.

§ 1314. Information and guidelines—Criteria development and publication

(a) (1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the

factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D) for the purpose of section 1313 of this title, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.

(3) Such criteria and information and revisions thereof shall be issued to the States and shall be published in the Federal Register and otherwise made available to the public.

Effluent limitation guidelines

(b) For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, published within one year of October 18, 1972, regulations, providing guidelines for effluent limitations and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best prac-

licable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b) (1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2) (A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b) (2) of section 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

(3) Identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.

Pollution discharge elimination procedures

(c) The Administrator, after consultation, with appropriate Federal and State agencies and other interested persons, shall issue to the States and appropriate water pollution control agencies within 270 days after October 18, 1972 (and from time to time thereafter) information on the processes, procedures, or operating methods which result in the elimination or reduction of the discharge of pollutants to implement standards of performance under section 1316 of this title. Such information shall include technical and other data, including costs, as are available on alternative methods of elimination or reduction of the discharge of pollutants. Such information, and revisions thereof, shall be published in the Federal Register and otherwise shall be made available to the public.

Secondary treatment information; alternative waste treatment management techniques and systems

(d) (1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within sixty days after October 18, 1972 (and from time to time thereafter) information, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within nine months after October 18, 1972 (and from time to time thereafter) information on alternative waste treatment management techniques and systems available to implement section 1231 of this title.

Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

(e) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

Guidelines for pretreatment of pollutants

(f) (1) For the purpose of assisting States in carrying out programs under section 1342 of this title, the Administrator shall publish, within one hundred and twenty days

after October 18, 1972, and review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

(2) When publishing guidelines under this subsection, the Administrator shall designate the category or categories of treatment works to which the guidelines shall apply.

Test procedure guidelines

(g) The Administrator shall, within one hundred and eighty days from October 18, 1972, promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 1341 of this title or permit application pursuant to section 1342 of this title.

Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower

(h) The Administrator shall (1) within sixty days after October 18, 1972, promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information from owners and operators of point-sources of discharge subject to any State program under section 1342 of this title, and (2) within sixty days from October 18, 1972, promulgate guidelines establishing the minimum procedural and other elements of any State program under section 1342 of this title which shall include:

(A) monitoring requirements;

(B) reporting requirements (including procedures to make information available to the public);

(C) enforcement provisions; and

(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit.)

**Restoration and enhancement of publicly owned
fresh water lakes**

(i) The Administrator shall, within 270 days after October 18, 1972 (and from time to time thereafter), issue such information on methods, procedures, and processes as may be appropriate to restore and enhance the quality of the Nation's publicly owned fresh water lakes.

**Agreements with Secretaries of Agriculture, Army, and
Interior to provide maximum utilization of programs to
achieve and maintain water quality; transfer of funds;
authorization of appropriations**

(j) (1) The Administrator shall, within six months from October 18, 1972, enter into agreements with the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior to provide for the maximum utilization of the appropriate programs authorized under other Federal law to be carried out by such Secretaries for the purpose of achieving and maintaining water quality through appropriate implementation of plans approved under section 1288 of this title.

(2) The Administrator, pursuant to any agreement under paragraph (1) of this subsection is authorized to transfer to the Secretary of Agriculture, the Secretary of the Army, or the Secretary of the Interior any funds appropriated under paragraph (3) of this subsection to supplement any funds otherwise appropriated to carry out

appropriate programs authorized to be carried out by such Secretaries.

(3) There is authorized to be appropriated to carry out the provisions of this subsection, \$100,000,000 per fiscal year for the fiscal year ending June 30, 1973, and the fiscal year ending June 30, 1974.

**§ 1316. National standards of performance—
Definitions**

(a) For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

Categories of sources; Federal standards of performance for new sources

(b) (1) (A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

- pulp and paper mills;
- paperboard, builders paper and board mills;
- meat product and rendering processing;
- dairy product processing;
- grain mills;
- canned and preserved fruits and vegetables processing;
- canned and preserved seafood processing;
- sugar processing;
- textile mills;
- cement manufacturing;
- feedlots;
- electroplating;
- organic chemicals manufacturing;
- inorganic chemicals manufacturing;
- plastic and synthetic materials manufacturing;
- soap and detergent manufacturing;
- fertilizer manufacturing;
- petroleum refining;
- iron and steel manufacturing;
- nonferrous metals manufacturing;
- phosphate manufacturing;
- steam electric powerplants;
- ferroalloy manufacturing;
- leather tanning and finishing;
- glass and asbestos manufacturing;
- rubber processing; and
- timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days

after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

State enforcement of standards of performance

(c) Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

Protection from more stringent standards

(d) Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed

as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26, whichever period ends first.

Illegality of operation of new sources in violation of applicable standards of performance

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

§ 1317. Toxic and pretreatment effluent standards; establishment; revision; illegality of source operation in violation of standards

(a) (1) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter revise) a list which includes any toxic pollutant or combination of such pollutants for which an effluent standard (which may include a prohibition of the discharge of such pollutants or combination of such pollutants) will be established under this section. The Administrator in publishing such list shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms.

(2) Within one hundred and eighty days after the date of publication of any list, or revision thereof, containing toxic pollutants or combination of pollutants under paragraph (1) of this subsection, the Administrator, in accordance with section 553 of Title 5, shall publish a proposed

effluent standard (or a prohibition) for such pollutant or combination of pollutants which shall take into account the toxicity of the pollutant, its persistence, degradability, the usual or potential presence of the affected organisms in any waters, the importance of the affected organisms and the nature and extent of the effect of the toxic pollutant on such organisms, and he shall publish a notice for a public hearing on such proposed standard to be held within thirty days. As soon as possible after such hearing, but not later than six months after publication of the proposed effluent standard (or prohibition), unless the Administrator finds, on the record, that a modification of such proposed standard (or prohibition) is justified based upon a preponderance of evidence adduced at such hearings, such standard (or prohibition) shall be promulgated.

(3) If after a public hearing the Administrator finds that a modification of such proposed standard (or prohibition) is justified, a revised effluent standard (or prohibition) for such pollutant or combination of pollutants shall be promulgated immediately. Such standard (or prohibition) shall be reviewed and, if appropriate, revised at least every three years.

(4) Any effluent standard promulgated under this section shall be at that level which the Administrator determines provides an ample margin of safety.

(5) When proposing or promulgating any effluent standard (or prohibition) under this section, the Administrator shall designate the category or categories of sources to which the effluent standard (or prohibition) shall apply. Any disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army.

(6) Any effluent standard (or prohibition) established pursuant to this section shall take effect on such date or dates as specified in the order promulgating such standard, but in no case more than one year from the date of such promulgation.

(7) Prior to publishing any regulations pursuant to this section the Administrator shall, to the maximum extent practicable within the time provided, consult with appropriate advisory committees, States, independent experts, and Federal departments and agencies.

(b) (1) The Administrator shall, within one hundred and eighty days after October 18, 1972, and from time to time thereafter, publish proposed regulations establishing pretreatment standards for introduction of pollutants into treatment works (as defined in section 1292 of this title) which are publicly owned for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works. Not later than ninety days after such publication, and after opportunity for public hearing, the Administrator shall promulgate such pretreatment standards. Pretreatment standards under this subsection shall specify a time for compliance not to exceed three years from the date of promulgation and shall be established to prevent the discharge of any pollutant through treatment works (as defined in section 1292 of this title) which are publicly owned, which pollutant interferes with, passes through, or otherwise is incompatible with such works.

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternatives change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 1316 of this title if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 1316 of this title for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

§ 1319. Enforcement—State enforcement; compliance orders

(a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 1311, 1312, 1316, 1317, or 1318 of this title in a permit issued by a State under an approved permit program under section 1342 of this title, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of permit con-

ditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, or 1318 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. Any order issued under this subsection shall be by personal service and shall state with reasonable specificity the nature of the violation, specify a time for compliance, not to exceed thirty days, which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such

order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 1318 of this title shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

Civil actions

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

Criminal penalties

(c) (1) Any person who willfully or negligently violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than \$50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter, or who falsifies, tam-

pers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

Civil penalties

(d) Any person who violates section 1311, 1312, 1316, 1317, or 1318 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to civil penalty not to exceed \$10,000 per day of such violation.

State liability for judgments and expenses

(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

§ 1341. Certification—Compliance with applicable requirements; application; procedures; license suspension

(a) (1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the con-

struction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other

State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility,

(B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1316, or 1317 of this title.

(6) No Federal agency shall be deemed to be an applicant for the purposes of this subsection.

(7) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

**Compliance with other provisions of law setting
applicable water quality requirements**

(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

**Authority of Secretary of the Army to permit use of spoil
disposal areas by Federal licensees or permittees**

(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

Limitations and monitoring requirements of certification

(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

§ 1342. National pollutant discharge elimination system—Permits for discharge of pollutants

(a) (1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as

the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this chapter, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h) (2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend

beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

State permit programs

(b) At any time after the promulgation of the guidelines required by subsection (h) (2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit of misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

Suspension of federal program upon submission of State program; withdrawal of approval of State program

(c) (1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(h) (2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guide-

lines promulgated pursuant to section 1314(h) (2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

Notification of Administrator

(d) (1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b) (5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

Waiver of notification requirement

(e) In accordance with guidelines promulgated pursuant to subsection (h) (2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any

category (including any class, type, or size within such category) of point sources within the State submitting such program.

Point source categories

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

Federal enforcement not limited

(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

Public information

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purposes of reproduction.

Compliance with permits

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

§ 1362. General Definitions

Except as otherwise specifically provided, when used in this Act:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used

either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D—Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

§ 1365. Citizen suits—Authorization: jurisdiction

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumental-

ity or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

Notice

(b) No action may be commenced—

(1) under subsection (a) (1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a) (2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

Venue; intervention by Administrator

(c) (1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

Litigation costs

(d) The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

Statutory or common law rights not restricted

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

Effluent standard or limitation

(f) For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under

section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

Citizen

(g) For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

Civil action by State Governors

(h) A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

§ 1369. Administrative procedure and judicial review

(a) (1) For purposes of obtaining information under section 1315 of this title, or carrying out section 1367(e) of this title, the Administrator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or author-

ized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpoena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpoenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpoena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) (1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b) (1) (C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or

transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

APPENDIX D

Regulations Involved

"EFFLUENT LIMITATIONS GUIDELINES" FOR THE INORGANIC CHEMICALS MANUFACTURING POINT SOURCE CATEGORY

The rulemaking order promulgating the foregoing regulations is found at 39 *Fed. Reg.* 9611-9639 (March 12, 1974). The preamble of the order and the text of the regulations for several subcategories is as follows:

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

Subchapter N—Effluent Guidelines and Standards

PART 415—INORGANIC CHEMICALS MANUFACTURING POINT SOURCE CATEGORY

On October 11, 1973 notice was published in the *FEDERAL REGISTER*, (38 FR 28174), that the Environmental Protection Agency (EPA or Agency) was proposing effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources within the aluminum chloride production subcategory, aluminum sulfate production subcategory, calcium carbide production subcategory, calcium chloride production subcategory, calcium oxide and hydroxide production subcategory, chlorine and sodium or potassium hydroxide production subcategory, hydrochloric acid production subcategory, hydrofluoric acid production subcategory, hydrogen peroxide production subcategory, nitric acid production subcategory, potassium metal production subcategory, potassium dichromate production subcategory, potassium sulfate production subcategory, sodium bicarbonate production subcategory, sodium carbonate production subcategory, sodium chloride production subcategory, sodium dichromate and sodium sulfate production subcategory, sodium metal production subcategory, sodium silicate pro-

duction subcategory, sodium sulfite production subcategory, sulfuric acid production subcategory, and titanium dioxide production subcategory of the inorganic chemicals manufacturing category of point sources.

The purpose of this notice is to establish final effluent limitations guidelines for existing sources and standards of performance and pretreatment standards for new sources in the inorganic chemicals manufacturing category of point sources, by amending 40 CFR Chapter I, Subchapter N, to add a new Part 415. This final rulemaking is promulgated pursuant to sections 301, 304(b) and (c), 306(b) and (c) and 307(c) of the Federal Water Pollution Control Act, as amended, (the Act); 33 U.S.C. 1251, 1311, 1314(b) and (c), 1316(b) and (c) and 1317(c); 86 Stat. 816 et seq.; Pub. L. 92-500. Regulations regarding cooling water intake structures for all categories of point sources under section 316(b) of the Act will be promulgated in 40 CFR Part 402.

In addition, the EPA is simultaneously proposing a separate provision which appears in the proposed rules section of the *FEDERAL REGISTER*, stating the application of the limitations and standards set forth below to users of publicly owned treatment works which are subject to pretreatment standards under section 307(b) of the Act. The basis of that proposed regulation is set forth in the associated notice of proposed rulemaking.

The legal basis, methodology and factual conclusions which support promulgation of this regulation were set forth in substantial detail in the notice of public review procedures published August 6, 1973 (38 FR 21202) and in the notice of proposed rulemaking for the aluminum chloride production subcategory, aluminum sulfate production subcategory, calcium carbide production subcategory, calcium chloride production subcategory, calcium oxide and hydroxide production subcategory, chlorine and sodium or potassium hydroxide production subcategory, hydrochloric acid production subcategory, hydrofluoric

acid production subcategory, hydrogen peroxide production subcategory, nitric acid production subcategory, potassium metal production subcategory, potassium dichromate production subcategory, potassium sulfate production subcategory, sodium bicarbonate production subcategory, sodium carbonate production subcategory, sodium chloride production subcategory, sodium dichromate and sodium sulfate production subcategory, sodium metal production subcategory, sodium silicate production subcategory, sodium sulfite production subcategory, sulfuric acid production subcategory, and titanium dioxide production subcategory. In addition, the regulations as proposed were supported by two other documents; (1) The document entitled "Development Document for Proposed Effluent Limitations Guidelines and New Source Performance Standards for the major inorganic products Segment of the Inorganic Chemicals Manufacturing Point Source Category" (August 1973) and (2) the document entitled "Economic Analysis of Proposed Effluent Guidelines, Inorganic Chemicals, Alkali and Chlorine Industries (Major Products)" (August, 1973). Both of these documents were made available to the public and circulated to interested persons at approximately the time of publication of the notice of proposed rulemaking.

Interested persons were invited to participate in the rulemaking by submitting written comments within 30 days from the date of publication. Prior public participation in the form of solicited comments and responses from the States, Federal agencies, and other interested parties were described in the preamble to the proposed regulation. The EPA has considered carefully all of the comments received and a discussion of these comments with the Agency's response thereto follows. The regulation as promulgated contains some significant departures from the proposed regulation. The following discussion outlines the reasons why these changes were made and why other suggested changes were not made.

Summary of Major Comments

The following responded to the request for written comments which was contained in the preamble to the proposed regulation: Airco Carbide, Allied Chemical Corporation, American Cyanamid Company, American Smelting & Refining Company, Atomic Energy Commission, BASF Wyandotte Corporation, B. F. Goodrich Chemical Company, California—State Water Resources Control Board, Chemetron Corporation, County Sanitation Districts of L.A. County, Detrex Chemical Industries, Diamond Shamrock Chemical Company, Dow Chemicals USA, E. I. DuPont de Nemours & Company, EPA Region VIII, Ferroalloys Association, Georgia-Pacific Corporation, Great Salt Lake Minerals & Chemicals Corporation, Hooker-Industrial Chemical Division, Kaiser Aluminum & Chemical Corporation, Kerr-McGee Chemical Corporation, Leslie Salt Company, Lowry Associates, Manufacturing Chemists Association, Michigan Chemical Corporation, Midwest Carbide Corporation, Monsanto, National Paint & Coating Association, NL Industries, Titanium Pigments Operations, N.J. Zinc Company (Bethlehem, Pa.), N.J. Zinc Company (Gloucester, N.J.), Olin Chemicals, Pacific Carbide & Alloys Company, Pennwalt Corporation, Philadelphia Quartz Company, Pittsburgh Plate Glass Industries, Salt Institute, San Francisco Bay Conservation & Development Commission, SMC Glidden-Durkee, State of Michigan—Department of Natural Resources, State of N.Y. Department of Environmental Conservation, State of Utah—Attorney General, State of Utah—Department of Natural Resources, State of Utah—Department of Social Services, Stauffer Chemical Company, The Chlorine Institute, Inc., Texas Chemical, Union Carbide Corporation, U.S. Department of Commerce, U.S. Department of the Interior, Vulcan Materials Company, Water Pollution Control Federation and Western Salt Company. The following is a summary of the significant comments and the Agency's response to those comments.

(1) Because of wide variations in plant age and size, product mix, manufacturing processes, and raw materials,

the guidelines should be expressed as ranges. Many commenters recommended adoption of ESWQIAC's proposed methodology.

The approach taken in developing effluent limitations guidelines standards of performance for the inorganic chemicals manufacturing industry was to examine all variables and segment the industry into workable subcategories consistent with these variations. Twenty-two subcategories have been established based on the chemical product manufactured. In cases where two dissimilar processes are used to manufacture the same product, separate limitations have been established within the subcategory. Thus, ranges are provided for, as are other factors, by segmenting the inorganic chemicals manufacturing point source category into discrete subcategories, each with its own limitation. ESWQIAC's proposal is under evaluation as a contribution toward future refinements on guidelines for some industries. The committee has indicated that their proposed methodology could not be developed in sufficient time to be available for the current phase of guideline promulgation, which is proceeding according to a court-ordered schedule. Its present state of development does not provide sufficient evidence to warrant the Agency's delaying issuance of any standard in hopes that an alternative approach might be preferable.

(2) Many commenters stated that a guideline requiring "no discharge of process waste water pollutants" is ambiguous. Also, they stated that the definition of "pollutant" should clearly exclude innocuous dissolved solids, such as chlorides and sulfates.

The terms "process waste water", "process waste water pollutants", and "discharge of pollutant(s)" are clearly defined in 40 CFR Part 401. Reference to these definitions is included whenever these terms are used. "No" discharge of process waste water pollutants to navigable waters means that process waste water pollutants may not be discharged to navigable water in quantities greater than

the detectable limits using the test methods presented in 40 CFR 136 "Guidelines establishing test procedures for the analysis of pollutants" published in the *FEDERAL REGISTER*, October 16, 1973. The term "pollutant(s)" as defined in 40 CFR Part 401 includes all dissolved materials, such as chlorides and sulfate. Where a discharge of process waste water pollutants has been allowed for chemical subcategories, it was concluded that only the selected pollutant parameters could be economically limited by technology-based standards. In some cases, however, where total recycle, sale, recovery, or reuse of process waste water is technically and economically feasible, the discharge of all process waste water pollutants has been limited.

(3) Some comments stated that the proposed pretreatment standards preclude industrial use of public treatment works.

The methodology for applying effluent limitation guidelines to discharges from point sources to municipal treatment systems has been given further consideration by the Agency. The pollutants present in the waste water generated by the manufacture of inorganic chemicals have been identified. Discharge of these pollutants to municipal treatment systems is allowed in limited quantities so as to ensure adequate treatment and to prevent interference with the performance of such a system. These pretreatment standards for existing point sources are being proposed as an amendment to 40 CFR Part 415.

(4) Many commenters stated that the cost estimates were low and did not include costs for auxiliary equipment, land acquisitions, sludge disposal, or research and development work. Additionally, it was said that the impact of these costs has been understated.

Cost information was obtained directly from industry during plant visits, from engineering firms and equipment suppliers, and from available literature. This data has been obtained from the best sources available to the Agency

and is believed to be representative of actual capital and operating costs.

In cases where commenters have supplied additional cost data, satisfactorily documented and detailed, to indicate that the initial estimates are low, the figures have been revised and the proposed guidelines altered accordingly. Consideration has also been given to comments questioning the magnitude of the projected economic impact. Specific comments are summarized for the chemical subcategory to which they apply.

(5) Some commenters questioned the use of a factor of two to relate daily maximums to 30-day averages.

Extensive, long-term data is not available for each of the 22 chemical subcategories. It was necessary, therefore, to rely on data from other segments of the inorganic chemicals industry, as well as data from other industrial categories. Based on this information and using good engineering judgement on the performance reliability of recommended treatment systems, a factor of two appears generous.

(6) Many commenters said that limitations should be clearly defined as representing the net pollutant contributions as a result of the specific manufacturing process being limited. They question whether allowances should be made for pollutants present in the intake water.

If not otherwise specified, the effluent limitation numbers in this regulation will be applied as absolute discharge limitations. The use of such absolute limitations is generally appropriate since the concentration of a pollutant remaining after the application of a given treatment technology is relatively independent of minor variations in the pollutant concentration in the waste or the source of the pollutant. EPA intends to amend the NPDES regulations to take into account, when appropriate, pollutants already existing in the stream, so that in certain cases an effluent limitation may be adjusted to take into account pollutants

entering with a discharger's supply providing the water is withdrawn from the same source into which it is discharged. If the source is other than the receiving waterbody, the effluent standards will be applied as absolute limitations without adjustment.

(7) Aluminum chloride. Some commenters said that a market may not exist for the scrubber water (a 28 percent aluminum chloride solution) and that costs to purify and concentrate the solution may be prohibitive. They recommend a discharge allowance be made for the scrubber waste water effluent.

Only "yellow grade" aluminum chloride, made with an excess of chlorine, requires wet scrubbing techniques on the gaseous waste stream. Two plants, representing approximately 40 percent of the total annual production of aluminum chloride, currently are able to sell their dilute scrubber solution. A re-evaluation of the costs to concentrate the dilute scrubber solution indicates that costs for concentration are approximately 0.4 percent of the selling price of aluminum chloride.

(8) Aluminum sulfate. Some commenters stated that recycle of leaks and spills may contaminate high purity grades of product. Also, aluminum clays may be used as the raw material in place of bauxite which significantly effects the raw waste load. The commenters said that area for ponds may not be available at all locations. Also, net rainfall will preclude the use of ponds. When a dry product is produced, some commenters questioned whether recycling water increases the evaporative load on equipment, increasing energy requirements.

The wastes generated in refining bauxite to produce iron-free hydrated alumina material are not considered to be process waste water pollutants resulting from the manufacture of iron-free aluminum sulfate. Process waste water pollutants generated by the refinement of bauxite ore are subject to the effluent guidelines to be promulgated in 40 CFR 421. If these wastes are segregated from leaks and

spills, contamination preventing recycle is not a problem. Other raw materials than bauxite, including clays and aluminum hydrate, generate greater quantities of raw waste because of impurities, but the waste water constituents are similar and the process is the same. Thus, although the use of different raw materials affects the raw waste load, it does not preclude the use of settling, clarification, and reuse of process waste water as recommended. The guidelines do not require plants to use large ponds to achieve no discharge of process waste water pollutants. Clarifiers may be used in locations where land is not available for funding. The costs for clarifiers are similar to the costs for ponding. A provision has been established to allow discharge from impoundments under some conditions of high rainfall.

(9) Calcium carbide. Calcium carbide manufacturers stated that it should be considered a ferroalloy because: (a) air standards consider it a ferroalloy; (b) all plants are members of Ferroalloy Assoc.; (c) it is usually made in complexes with ferroalloys; (d) it uses similar processes in similar ovens. Commentors also expressed concern that the only two plants achieving the proposed guidelines are unique, using an uncovered furnace. Other plants recover gaseous carbon monoxide and must scrub the gas to remove impurities. Because of high temperatures dry bag collection of dust is not feasible.

A portion of calcium carbide is produced in both the ferroalloy industry and the inorganic chemicals industry. The regulation presented herein is applicable to discharges from calcium carbide production in open furnaces. Plants employing this manufacturing process are not located in ferroalloy complexes. Effluent limitations for waste water discharges from calcium carbide production in covered furnaces will be established in a forthcoming regulation as part of the ferroalloy industry. This distinction will accommodate differences in process waste water from plants using open furnaces and those using covered furnaces.

(10) Calcium oxide and calcium hydroxide. Many commenters mentioned that costs for converting to a dry bag house from a wet scrubber system are economically unjustified. They also state that reuse of the water is not possible because of impurities.

The guidelines do not require conversion to a dry air pollution abatement system. An alternate treatment system consists of settling suspended solids and total recycle of the supernatant to the scrubbing system. At least one lime plant currently employs this treatment system to achieve the guidelines.

(11) Chlorine. Some commenters pointed out the fact that the proposed mercury limit for the mercury cell process is not achievable using the best practicable technology and that the location of mercury monitoring should be clearly specified as leaving the mercury treatment facility. They further state that no discharge of process waste water pollutants is not demonstrated in plants using either the diaphragm or mercury cell process and appears to be technically impossible. It should definitely not be required of new sources. Some commenters said that the lead limitation appears to be unachievable. They state that there is no rationale for having a more stringent TSS limitation on diaphragm cell plants than mercury cell plants.

While three plants are currently meeting the proposed guidelines, supplied data indicates that the proposed mercury limitation is not being achieved in certain plants employing the best practicable control technology currently available. The standard has been revised, considering the effluent reduction achieved by a greater number of plants. The limitation is intended to indicate mercury levels in the waste stream from the mercury treatment facility because mercury residuals may not be controllable. This is clearly stated in 40 CFR 415.61. The presence of lead in the effluent from diaphragm cell plants results from the development of cracks around protective resin seals which encase underlying lead mountings. Currently, one-third of the

industry is using anodes which do not require lead mountings. Industry representatives state that another one-third are seriously considering conversion. The lead limitation is the average value discharged from three plants which have not converted to lead-free anodes. The new sources performance standards of no discharge of process waste water pollutants is not presently demonstrated, and research and development may require several years. Therefore, new sources will be required to meet the best performance demonstrated in exemplary plants. The suspended solids limitation has been reevaluated for discharges from the diaphragm cell process.

(12) Many commenters stated that a provision should be established to allow for the discharge of leaks, spills, and washdown waste waters.

Spills, leaks, and washdown waste waters may be minimized or eliminated by good housekeeping, operation, and maintenance. The process waste water should be segregated from other waste streams and may be collected and fed back into the manufacturing process.

(13) Sulfuric acid. Some commenters stated that single adsorption plants can not eliminate their scrubber effluent, leaks and spills, or start-up and shut-down waste waters.

Good housekeeping, operation and equipment maintenance will minimize the volume of waste waters to a point where reuse or sale of the recovered acid product is feasible.

(14) Hydrogen peroxide—organic process. Some commenters said that total process waste water recycle is not possible because of organic impurities present in the waste streams.

The technology to achieve no discharge of process waste water pollutants is considered to be best available and best demonstrated technology. Organic solvents of the type used in the manufacturing process can be removed by skimming and carbon adsorption treatment. Best prac-

ticable technology consists of oil separation and clarification, treatments presently used in the industry to attain the required pollutant reductions.

(15) Potassium dichromate. Some commenters mentioned that replacement of barometric condensers with noncontact heat exchangers has not been demonstrated and should not be required by 1977. They also questioned whether reuse of sodium dichromate is possible in all plants.

Recycle of unreacted sodium dichromate is technically possible in all plants if segregation of waste streams and good housekeeping is practiced. Conversion to noncontact heat exchangers is being accomplished in the potassium dichromate industry. Noncontact heat exchangers are widely used and have been a proven technology in the chemical industry for many years.

(16) Sodium. Commenters stated that TSS removals to less than 50 mg/l have not been demonstrated in waste streams resulting from sodium manufacturing.

The technologies required to achieve the proposed TSS limitation are widely demonstrated. These alternatives include sedimentation, flocculation, and clarification. The suspended solids are primarily the decomposition products of the cells and alkaline salts.

(17) Sodium sulfite. Several comments stated that no discharge of process waste water pollutants is based upon recovery of sodium sulfate which is not possible because of a limited market. Also, wastes contain impurities other than sulfates. Returning these impurities to the process is not possible. Some commenters said that the COD limitation is confusing.

The COD limitation is in the units recommended in Standard Methods for Waste Water Analysis. The guidelines do not require the sale of sodium sulfate. Satisfactory land disposal of the unused sodium sulfate would cost approximately two percent of the selling price of sodium

sulfite. The waste waters may be segregated, treated and recycled to the process.

(18) Sodium carbonate. Some commenters stated that gravity sedimentation will not reduce the suspended solids concentration to the recommended 25 mg/l concentration. They say particles are very fine and a filter precoat is required. A small suspended solids reduction is not justified by the cost. Various manufacturers recommend using a suspended solids concentration of 50 mg/l as it is compatible with actual settling pond performance and is a more "realistic and achievable level".

The treatment technologies required to attain the affluent pollutant reduction proposed are conventional and proven treatment systems. Treatment alternatives include sedimentation basins, flocculators and clarifiers.

(19) Sodium dichromate. Some commenters mentioned that technology has not been demonstrated to achieve no discharge of process waste water pollutants and that it is technically impossible. The 1977 standard is based on a plant which is only two years old. Commenters question whether existing plants can economically achieve its effluent quality.

The control technology used at the exemplary plant consists of leak and spill containment and pickle liquor treatment for chromium reduction followed by sedimentation to achieve the proposed guidelines. Another plant uses conventional sodium hydrosulfide treatment and lime to attain the proposed chromium levels. The proposed effluent limitations can be attained in existing facilities. The proposed new source performance standards were based on evaporation to attain no discharge of process waste water pollutants. Considering nonwater environmental aspects, the new source performance standards have been revised to require good water conservation and best practicable technology.

(20) Sodium chloride. Commentors stated that most plants return unused bitters to the source. They feel that

discharges do not threaten aquatic life or contribute to water pollution and that recovery of potassium and magnesium salts is not economical.

Although some plants may have ample land to store waste biterms, this treatment is not universally applicable. Alternative means to achieve no discharge of process waste water pollutants are economically prohibitive. If no pollutants are added to the waste biterms, return of the unused salts to the source is a reasonable limitation for technology-based standards.

(21) Sodium Silicate. Some comments stated that sodium hydroxide, sodium sulfate, and silica should not be considered pollutants. Because of their natural occurrence in most waters, costs to achieve no discharge of these compounds are not justified. They further state that recycle is not possible because of turbidity problems and evaporation ponds are not universally applicable.

A reexamination of initial data and consideration of substantial comments indicate that cost of treatment to achieve no discharge of process waste water pollutants may not be justified for a 1977 standard. Best practicable technology has been redefined as a well-designed and operated settling basin.

(22) Titanium dioxide. Several commenters stated that the costs to achieve the proposed limitations place a greater financial burden on titanium dioxide producers using the sulfate process than those using the chloride process. They say that this economic inequity may force some sulfate process plants to close down because of their inability to recover treatment costs while maintaining competitive prices. It was stated that polishing filtration is necessary to achieve the suspended solids limitations for discharges from the sulfate process. The commenters said that some of the pollutant parameters selected as the subject of effluent guidelines should be eliminated. Industry further stated that the flow basis of 100,000 l/kg for the sulfate process is not achievable. Several commenters question

the use of "dissolved iron" as the means to limit iron. They feel "total iron" should be used so as to include the total quantities of iron being discharged regardless of its state.

(i) Chloride Process. A re-evaluation of the pollutant parameters selected indicates that effluent standards for metals other than iron are not necessary requirements to establish compliance with best practicable technology currently available. While monitoring aluminum, lead, etc., provides for stricter effluent control, these metals are present only in small quantities relative to the iron content. They are removed to acceptable levels if the iron limitation is maintained. The guidelines represent the quantities of pollutants which may be discharged based on treatment technology. The recommended treatment includes iron precipitation and clarification. The efficiency of this treatment may be best determined by measuring the total iron content of the effluent. Data from this type of treatment indicates that a effluent containing 4 mg/l total iron can be achieved.

(ii) Sulfate process. Inclusion of effluent limitations for suspended solids, pH, and iron are sufficient to ensure compliance with the effluent reduction attainable through the application of the required levels of treatment technology. Other waste water constituents appear in relatively minor quantities and are adequately removed when the iron limitation is achieved. The rationale presented above for using the parameter "total iron" is applicable to the sulfate process also. The process waste water flow basis of 100,000 l/kg has been re-examined. Based on initial data and comments received this basis has been revised. A total process waste water flow of 210,000 l/kg of product is achievable using recycle of scrubber water. Detailed data have been supplied subsequent to the publication of the proposed regulations. These data indicate the costs to reduce the TSS concentration to 25 mg/l are greater than initially estimated. Considering the nature of the solids and the expected performance from the recommended

treatment system a concentration basis of 50 mg/l is reasonable for a 1977 standard.

(23) Some commenters said that provisions should be established to allow for discharges from treatment or holding ponds in the event of catastrophic rain storms.

For chemicals subcategories which have a limitation of no discharge of process waste water pollutants to navigable waters and for which ponds may be part of the treatment system, an allowance has been provided to permit a discharge of process waste water from a plant located in an area where rainfall exceeds the evaporation rate or in the event of a catastrophic rainfall.

Revision of the Proposed Regulation Prior to Promulgation

As a result of public comment and continuing review and evaluation of the proposed regulation by EPA, the following changes have been made in the regulation.

(1) The applicability of the proposed regulations for calcium carbide production has been amended to include only calcium carbide production in uncovered furnaces.

(2) The effluent limitation guidelines for sodium chloride production have been amended to allow for the return of unused salt wastes to the body of water from which the brine solution was initially obtained. No additional pollutants may be added to the waste salt solution prior to discharge.

(3) The effluent limitation for sodium silicate production based on the application of best practicable technology currently available has been revised to permit a discharge of small quantities of suspended solids.

(4) The new source performance standards for the sodium dichromate production subcategory and the sodium sulfite production subcategory have been revised to require good water conservation and implementation of the best practicable technology currently available.

(5) The new source performance standards for chlorine production have also been amended to allow for a waste water discharge from both diaphragm and mercury cell plants.

(6) The mercury limitation has been revised for mercury cell chlorine plants based on the effluent reduction attainable by the best practicable technology currently available.

(7) The effluent limitation of suspended solids has been revised for diaphragm cell chlorine plants.

(8) The effluent limitations for titanium dioxide production have been changed to exclude limitations on trace elements. The parameter "total dissolved iron" has been amended to "total iron" and the guideline has been altered accordingly.

(9) The effluent limitations for titanium dioxide production by the sulfate process have been changed. The flow basis has been increased resulting in less stringent limitations on iron and suspended solids.

(10) Minor adjustments have been made to reflect the fact that an increased number of definitions and analytical methods have been included in 40 CFR 401 and are incorporated by reference where applicable.

(11) Section 304(b)(1)(B) of the Act provides for "guidelines" to implement the uniform national standards of section 301(b)(1)(A). Thus Congress recognized that some flexibility was necessary in order to take into account the complexity of the industrial world with respect to the practicability of pollution control technology. In conformity with the Congressional intent and in recognition of the possible failure of these regulations to account for all factors bearing on the practicability of control technology, it was concluded that some provision was needed to authorize flexibility in the strict application of the limitations contained in the regulation where required by special circumstances applicable to individual dischargers. Accord-

ingly, a provision allowing flexibility in the application of the limitations representing best practicable control technology currently available has been added to each subpart, to account for special circumstances that may not have been adequately accounted for when these regulations were developed.

(12) An allowance has been provided to permit the discharge of process waste water pollutants from plants located in areas where precipitation exceeds evaporation. An allowance has also been provided for discharge in the event of a catastrophic rainfall. These allowances are applicable only to chemical subcategories which may utilize ponds to achieve no discharge of process waste water pollutants.

Economic Impact

The changes that were made to the proposed regulations for the inorganic chemicals manufacturing category do not substantially affect the initial economic analysis. The changes detailed above concern new sources and reflect a re-evaluation of the efficiency of various treatment systems. These revisions, however, do not affect the conclusions of the economic impact study.

Cost-Benefit Analysis

The detrimental effects of the constituents of waste waters now discharged by point sources within the major inorganic products segment of the inorganic chemicals manufacturing point source category are discussed in Section VI of the report entitled "Development Document for Effluent Limitations Guidelines for the major inorganic products segment of the Inorganic Chemicals Manufacturing Point Source Category" (August 1974). It is not feasible to quantify in economic terms, particularly on a national basis, the costs resulting from the discharge of these pollutants to our Nation's waterways. Nevertheless, as indicated in Section VI, the pollutants discharged have

substantial and damaging impacts on the quality of water and therefore on its capacity to support healthy populations of wildlife, fish and other aquatic wildlife and on its suitability for industrial, recreational and drinking water supply uses.

The total cost of implementing the effluent limitations guidelines includes the direct capital and operating costs of the pollution control technology employed to achieve compliance and the indirect economic and environmental costs identified in Section VIII and in the supplementary report entitled "Economic Analysis of Proposed Effluent Guidelines Inorganic Chemicals, Alkali and Chlorine Industries (Major Products)" (August 1973). Implementing the effluent limitations guidelines will substantially reduce the environmental harm which would otherwise be attributable to the continued discharge of polluted waste waters from existing and newly constructed plants in the inorganic chemicals manufacturing industry. The Agency believes that the benefits of thus reducing the pollutants discharged justify the associated costs which, though substantial in absolute terms, represent a relatively small percentage of the total capital investment in the industry.

Publication of Information on Processes, Procedures, or Operating Methods Which Result in the Elimination or Reduction of the Discharge of Pollutants

In conformance with the requirements of Section 304 (c), a manual entitled, "Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the MAJOR INORGANIC PRODUCTS Segment of the Inorganic Chemicals Manufacturing Point Source Category," has been published and is available for purchase from the Government Printing Office, Washington, D. C. 20401 for a nominal fee.

Final Rulemaking

In consideration of the foregoing, 40 CFR Chapter I, Subchapter N is hereby amended by adding a new Part 415, Inorganic Chemicals Manufacturing Point Source Category, to read as set forth below. This final regulation is promulgated as set forth below and shall be effective on May 13, 1974.

Dated: March 4, 1974.

JOHN QUARLES,
Acting Administrator.

Subpart A—Aluminum Chloride Production Subcategory

Sec.

- 415.10 Applicability; description of the aluminum chloride production subcategory.
- 415.11 Specialized definitions.
- 415.12 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.13 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.14 [Reserved]
- 415.15 Standards of performance for new sources.
- 415.16 Pretreatment standards for new sources.

Subpart B—Aluminum Sulfate Production Subcategory

- 415.20 Applicability; description of the aluminum sulfate production subcategory.
- 415.21 Specialized definitions.
- 415.22 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

Sec.

- 415.23 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.24 [Reserved]
- 415.25 Standards of performance for new sources.
- 415.26 Pretreatment standards for new sources.

Subpart C—Calcium Carbide Production Subcategory

- 415.30 Applicability; description of the calcium carbide production subcategory.
- 415.31 Specialized definitions.
- 415.32 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.33 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.34 [Reserved]
- 415.35 Standards of performance for new sources.
- 415.36 Pretreatment standards for new sources.

Subpart D—Calcium Chloride Production Subcategory

- 415.40 Applicability; description of the calcium chloride production subcategory.
- 415.41 Specialized definitions.
- 415.42 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

Sec.

- 415.43 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.44 [Reserved]
- 415.45 Standards of performance for new sources.
- 415.46 Pretreatment standards for new sources.

Subpart E—Calcium Oxide and Calcium Hydroxide Production Subcategory

- 415.50 Applicability; description of the calcium oxide and calcium hydroxide production subcategory.
- 415.51 Specialized definitions.
- 415.52 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.53 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.54 [Reserved]
- 415.55 Standards of performance for new sources.
- 415.56 Pretreatment standards for new sources.

Subpart F—Chlorine and Sodium or Potassium Hydroxide Production Subcategory

- 415.60 Applicability; description of the chlorine and sodium or potassium hydroxide production subcategory.
- 415.61 Specialized definitions.
- 415.62 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

Sec.

- 415.63 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.64 [Reserved]
- 415.65 Standards of performance for new sources.
- 415.66 Pretreatment standards for new sources.

Subpart G—Hydrochloric Acid Production Subcategory

- 415.70 Applicability; description of the hydrochloric acid production subcategory.
- 415.71 Specialized definitions.
- 415.72 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.73 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.74 [Reserved]
- 415.75 Standards of performance for new sources.
- 415.76 Pretreatment standards for new sources.

Subpart H—Hydrofluoric Acid Production Subcategory

- 415.80 Applicability; description of the hydrofluoric acid production subcategory.
- 415.81 Specialized definitions.
- 415.82 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

Sec.

- 415.83 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.84 [Reserved]
- 415.85 Standards of performance for new sources.
- 415.86 Pretreatment standards for new sources.

Subpart I—Hydrogen Peroxide Production Subcategory

- 415.90 Applicability; description of the hydrogen peroxide production subcategory.
- 415.91 Specialized definitions.
- 415.92 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.93 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.94 [Reserved]
- 415.95 Standards of performance for new sources.
- 415.96 Pretreatment standards for new sources.

Subpart J—Nitric Acid Production Subcategory

- 415.100 Applicability; description of the nitric acid production subcategory.
- 415.101 Specialized definitions.
- 415.102 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

Sec.

- 415.103 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.104 [Reserved]
- 415.105 Standards of performance for new sources.
- 415.106 Pretreatment standards for new sources.

Subpart K—Potassium Metal Production Subcategory

- 415.110 Applicability; description of the potassium metal production subcategory.
- 415.111 Specialized definitions.
- 415.112 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.113 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.114 [Reserved]
- 415.115 Standards of performance for new sources.
- 415.116 Pretreatment standards for new sources.

Subpart L—Potassium Dichromate Production Subcategory

- 415.120 Applicability; description of the potassium dichromate production subcategory.
- 415.121 Specialized definitions.
- 415.122 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

Sec.

- 415.123 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.124 [Reserved]
- 415.125 Standards of performance for new sources.
- 415.126 Pretreatment standards for new sources.

Subpart M—Potassium Sulfate Production Subcategory

- 415.130 Applicability; description of the potassium sulfate production subcategory.
- 415.131 Specialized definitions.
- 415.132 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.133 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.134 [Reserved]
- 415.135 Standards of performance for new sources.
- 415.136 Pretreatment standards for new sources.

Subpart N—Sodium Bicarbonate Production Subcategory

- 415.140 Applicability; description of the sodium bicarbonate production subcategory.
- 415.141 Specialized definitions.
- 415.142 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

Sec.

- 415.143 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.144 [Reserved]
- 415.145 Standards of performance for new sources.
- 415.146 Pretreatment standards for new sources.

Subpart O—Sodium Carbonate Production Subcategory

- 415.150 Applicability; description of the sodium carbonate production subcategory.
- 415.151 Specialized definitions.
- 415.152 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.153 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.154 [Reserved]
- 415.155 Standards of performance for new sources.
- 415.156 Pretreatment standards for new sources.

Subpart P—Sodium Chloride Production Subcategory

- 415.160 Applicability; description of the sodium chloride production subcategory.
- 415.161 Specialized definitions.
- 415.162 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.163 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

Sec.

- 415.164 [Reserved]
- 415.165 Standards of performance for new sources.
- 415.166 Pretreatment standards for new sources.

**Subpart Q—Sodium Dichromate and Sodium Sulfate
Production Subcategory**

- 415.170 Applicability; description of the sodium dichromate and sodium sulfate production subcategory.
- 415.171 Specialized definitions.
- 415.172 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.173 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.174 [Reserved]
- 415.175 Standards of performance for new sources.
- 415.176 Pretreatment standards for new sources.

Subpart R—Sodium Metal Production Subcategory

- 415.180 Applicability; description of the sodium metal production subcategory.
- 415.181 Specialized definitions.
- 415.182 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.183 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.184 [Reserved]

Sec.

- 415.185 Standards of performance for new sources.
- 415.186 Pretreatment standards for new sources.

Subpart S—Sodium Silicate Production Subcategory

- 415.190 Applicability; description of the sodium silicate production subcategory.
- 415.191 Specialized definitions.
- 415.192 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.193 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.194 [Reserved]
- 415.195 Standards of performance for new sources.
- 415.196 Pretreatment standards for new sources.

Subpart T—Sodium Sulfite Production Subcategory

- 415.200 Applicability; description of the sodium sulfite production subcategory.
- 415.201 Specialized definitions.
- 415.202 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.203 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.204 [Reserved]
- 415.205 Standards of performance for new sources.
- 415.206 Pretreatment standards for new sources.

Subpart U—Sulfuric Acid Production Subcategory

Sec.

- 415.210 Applicability; description of the sulfuric acid production subcategory.
- 415.211 Specialized definitions.
- 415.212 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.213 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.214 [Reserved]
- 415.215 Standards of performance for new sources.
- 415.216 Pretreatment standards for new sources.

Subpart V—Titanium Dioxide Production Subcategory

- 415.220 Applicability; description of the titanium dioxide production subcategory.
- 415.221 Specialized definitions.
- 415.222 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
- 415.223 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
- 415.224 [Reserved]
- 415.225 Standards of performance for new sources.
- 415.226 Pretreatment standards for new sources.

AUTHORITY: Secs. 301, 304(b) and (c), 306(b) and (c), 307(c), Pub. L. 92-500; 86 Stat. 816 et seq.; (33 U.S.C. 1251, 1311, 1314(b) and (c), 1316(b) and (c), 1317(c)).

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SUBPART S—SODIUM SILICATE PRODUCTION SUBCATEGORY**§ 415.190 Applicability; description of the sodium silicate production subcategory.**

The provisions of this subpart are applicable to discharges resulting from the production of sodium silicate.

§ 415.191 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR 401 shall apply to this subpart.

(b) The term "product" shall mean sodium silicate.

§ 415.192 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines.

On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

Effluent characteristic	Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days shall not exceed
	Metric units (kilograms per 1,000 kg of product)	
TSS.....	0.01	0.005
pH.....	Within the range 6.0 to 9.0.	
	English units (pounds per 1,000 lb of product)	
TSS.....	0.01	0.005
pH.....	Within the range 6.0 to 9.0.	

§ 415.193 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

(a) Subject to the provisions of paragraph (b) of this section there shall be no discharge of process waste water pollutants into navigable waters.

(b) A process waste water impoundment which is designed, constructed, and operated so as to contain the precipitation from the 25 years, 24 hour rainfall event as established by the National Climatic Center, National Oceanic and Atmospheric Administration for the area in which such impoundment is located may discharge that volume of process waste water which is equivalent to the volume of precipitation that falls within the impoundment in excess of that attributable to the 25 year, 24 hour rainfall event, when such event occurs.

§ 415.194 [Reserved]

§ 415.195 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

(a) Subject to the provisions of paragraph (b) of this section there shall be no discharge of process waste water pollutants into navigable waters.

(b) A process waste water impoundment which is designed, constructed, and operated so as to contain the precipitation from the 25 year, 24 hour rainfall event as established by the National Climatic Center, National

Oceanic and Atmospheric Administration for the area in which such impoundment is located may discharge that volume of process waste water which is equivalent to the volume of precipitation that falls within the impoundment in excess of that attributable to the 25 year, 24 hour rain-fall event, when such event occurs.

§ 415.196 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the sodium silicate production subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in Part 128 of this Chapter, except that, for the purpose of this section, § 128.133 of this chapter shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 415.195; *Provided*, That, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

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**SUBPART U—SULFURIC ACID PRODUCTION
SUBCATEGORY**

§ 415.210 Applicability; description of the sulfuric acid production subcategory.

The provisions of this subpart are applicable to discharges resulting from the production of sulfuric acid in single and double adsorption plants. The provisions are

not applicable to discharges from plants recovering waste sulfuric acid.

§ 415.211 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR 401 shall apply to this subpart.

§ 415.212 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional

Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available: there shall be no discharge of process waste water pollutants to navigable waters.

§ 415.213 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable: there shall be no discharge of process waste water pollutants to navigable waters.

§ 415.214 [Reserved]

§ 415.215 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart: there shall be no discharge of process waste water pollutants to navigable waters.

§ 415.216 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the sulfuric acid production subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in Part 128 of this Chapter, except that, for the purpose of this section, § 128.133 of this Chapter shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 415.215; *Provided*, That, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

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